Jurisdictional Statement

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No.

In the Supreme Court of the United States

OCTOBER TERM 1981

GEORGE H. RYAN, et al., Appellants,
v.
EARL NEIL OTTO, et al. Appellees.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED*

Following the 1980 Federal decennial census, the General Assembly of the State of Illinois failed to perform its constitutional duty to redistrict the State of Illinois, which lost two seats in the House of Representatives as a result of the 1980 census. These consolidated cases were brought requesting the three-judge district court to adopt a redistricting plan that meets the applicable constitutional cirteria. The district court, with Chief Judge McGarr dissenting, imposed one of three plans presented to it for its consideration, all of which contained population deviations among districts that are well within the guidelines set forth by this Court for congressional districts. The questions presented on this appeal are whether the district court erred:

1. in misapplying this Court's decision in *Gaffney v. Cummings*, 412 U.S. 735 (1973), to adopt a redistricting plan based upon its novel concept of partisan "political fairness";

2. in giving undue weight, in conflict with the decisions of other district courts, to miniscule differences in the maximum population deviations among the districts contained in the various plans;

3. in adopting a plan that packs suburban blacks and Hispanics into minority-controlled districts dominated by the City of

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* This appeal involves three consolidated cases. The plaintiff in *Otto v. Kusper*, No. 81 C 4103, is Earl Neil Otto. The defendants are Stanley Kusper, the State Board of Elections, Ronald D. Michaelson, Carolyn Eyre, John Countryman, Richard Cowen, J. Phil Gilbert, Joshua Johnson, John J. Lanigan, Michael J. Hamblet and Teresa M. Petrone. The plaintiffs in *Ysursa v. State Board of Elections, State of Illinois*, No. 81-5162, are Bernard J. Ysursa and Robert W. Cadagin. The State Board is the only defendant. The plaintiffs in *Ryan v. State Board of Elections of the State of Illinois*, No. 81 C 3915, are George H. Ryan, Monica Faith Stewart, Arthur L. Turner, the House of Representatives of the State of Illinois, Mark Q. Rhoads, Hyman Schneider, Phil Schneider and Patrick Rea. The defendants in *Ryan* are the same as the defendants in *Otto*, although Otto himself is a defendant in *Ryan*. After these cases were consolidated, the district court allowed the following persons and organization to intervene as parties plaintiff: Eleanor T. Colson; Michael J. Howlett; Richard B. Ogilvie; John S. Jackson III; Congressman Augustus P. Savage; Congressman Harold Washington; Congressman Robert McClory; and the Political Action Conference of Illinois.

Chicago, thereby diluting the impact of minorities on congressional elections in the suburbs;

4. in failing, in conflict with this Court's decision in *White v. Weiser*, 412 U.S. 783 (1973), to accord appropriate weight to the policy of the State of Illinois by rejecting a plan that had been the subject of extensive public discussion and debate and had been subsequently approved by one house of the Illinois legislature; and

5. by imposing a plan that wholly ignores the political subdivisions within the State of Illinois when the District Court had before it another plan that met all other applicable constitutional criteria and did not produce the wholesale fragmentation of existing political subdivisions.

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In the

Supreme Court of the United States

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No.

IN RE:
ILLINOIS CONGRESSIONAL
DISTRICTS REAPPORTIONMENT
CASES

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

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JURISDICTIONAL STATEMENT

CITATION TO OPINION BELOW

The November 23, 1981 Memorandum Opinion and Order issued by the three-judge court, and the judgment entered by the Clerk of the district court on December 3, 1981, are not officially reported. The Memorandum Opinion and Order were filed in the United States District Court for the Northern District of Illinois, Eastern Division as Civil Master File Number 81 C 3915; they are set forth in the accompanying Appendix at 1-23.

JURISDICTION

On July 10, 1981, the Ryan plaintiffs filed their complaint invoking federal jurisdication pursuant to 28 U.S.C. §§ 1343, 2201, 2202 and 2284. The complaint sought declaratory and injunctive relief to redistrict the State of Illinois into 22 congressional districts of substantially equal population pursuant to a plan which the Ryan plaintiffs submitted to the district court with their complaint. The Ryan plaintiffs invoked the district court's jurisdiction to prevent an alleged violation of federal constitutional and statutory rights, including those protected by the Constitution of the United States, Article I, Section 2; the Four-

teenth Amendment. Sections 1 and 2: the Fifteenth Amendment: and 42 U.S.C. §1983.

A statutory three-judge court was convened pursuant to 28 U.S.C. §2284(a), composed of Circuit Judge Robert A. Sprecher, Chief District Judge Frank J. McGarr and District Judge Susan Getzendanner. On November 23, 1981, after notice and trial, the court issued a Memorandum Opinion over the dissent of Chief Judge McGarr, granting in part and denying in part the permanent injunctive relief requested by the Ryan plaintiffs. The district court redistricted the State of Illinois into 22 congressional districts, but denied the Ryan plaintiffs' prayer that their redistricting plan be adopted.

The Clerk of the district court entered judgment on the court's permanent injunction on December 3, 1981; the Ryan plaintiffs filed their Notice of Appeal with the district court later that day. Jurisdiction is conferred on this Court by 28 U.S.C. § 1253 to review a decision of a statutory three-judge court upon appeal by any party from an order or judgment granting or denying injunctive relief.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved in this appeal are reproduced in the Appendix at App. 1.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this appeal are reproduced in the Appendix at App. 2.

STATEMENT OF THE CASE

In April 1981, the Clerk of the United States House of Representatives sent to the Governor and the General Assembly of the State of Illinois, a certificate indicating that, based upon the 1980 census, the State of Illinois was entitled to 22 congressional districts. Based upon the 1970 census, Illinois now has 24 districts. Upon receipt of this information, it was the duty of the General Assembly of the State of Illinois to redistrict the state into 22 congressional districts of substantially equal population.

U.S. Const., Art I., §§ 2,4; Amend. XIV, §1.

Pursuant to its constitutional duty, the House of Representatives of the General Assembly on June 23, 1981 adopted House Bill 1902, the congressional redistricting plan which the Ryan plaintiffs proposed to the district court in these consolidated cases. The State Senate adopted its own plan, Senate Bill 297, on June 28, 1981. However, the General Assembly adjourned on July 2, 1981 without taking any final action on either the House or the Senate plan. Similiar legislative inaction in 1971 compelled United States District Court for the Northern District of Illinois to adopt its own congressional redistricting plan in *Skolnick v. State Electoral Board of Illinois*, 336 F. Supp. 839 (N.D. Ill. 1971). That plan remained in effect through the 1980 elections.

On June 30, 1981, Earl Neil Otto, a resident of the Fourth Congressional District of Illinois, brought a congressional redistricting suit as No. 81 L 15260 in the Circuit Court of Cook County.

On July 1, 1981, Bernard J. Ysursa, a resident in the Southern District of Illinois, initiated a similar action (No. 81-5162) in the United States District Court for the Southern District of Illinois.

On July 10, 1981, George H. Ryan, a resident of the Seventeenth Congressional District, and others, including residents of the Second, Fourth and Seventh Congressional Districts,* filed a congressional redistricting suit (No. 81 C 3915) in the United States District Court for the Northern District of Illinois, Eastern Division.**

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* Plaintiff Ryan is Speaker of the House of Representatives of the State of Illinois. The other plaintiffs in the Ryan suit are State Representatives Monica Faith Stewart and Arthur L. Turner; the House of Representatives of the State of Illinois; State Senator Mark Q. Rhoads; Hyman Schneider; Phil Schneider; and Patrick Rea.

** Initially, the District Court refused to consider the *Ryan* action on abstention grounds; and similarly abstained in the *Otto* case after the Illinois Attorney General had removed it to the district court from the Circuit Court of Cook

Footnote continued on next page.

On October 8, 1981, the Chief Judge of the Court of Appeals of the Seventh Circuit appointed a three-judge court to hear and determine the *Otto*, *Ysursa* and *Ryan* cases, and on October 19, 1981, the district court consolidated the three cases for trial, and designated the consolidated cases as "In Re Illinois Congressional Districts Reapportionment Cases."

The district court granted other interested persons and one organization leave to intervene. They will be identified hereafter as the facts require.

Three maps were presented at the trial which commenced on November 5 and concluded on November 11, 1981:

1) The Otto plan was adopted by the district court in its Memorandum Opinion and Order of November 23, 1981. The Democratic leadership of the House of Representatives of the State of Illinois developed this plan in consultation with demographic expert, after the General Assembly had adjourned and after the House had already approved its own plan.

The expert supporting the Otto plan testified that he and the Democratic party leadership considered four criteria in developing their plan: (a) population equality; (b) non-retrogression in minority representation; (c) a concept of "political fairness"; and (d) avoidance of the pairing of incumbents, if possible (Tr. 239-243). The Otto expert specifically rejected as an appropriate criterion for redistricting the principle of respect for the integrity of political subdivision boundaries and in particular, the boundary between the City of Chicago and its suburbs (Tr. 246). In fact, the Otto plan contains only one district that is wholly within the Chicago city limits; it has seven districts which extend into the suburbs to include substantial numbers of persons who reside in the suburbs. Six of these districts have a majority of Chicago residents (Otto Exhibit 72A.)

** *Continued*

County. The Court of Appeals for the Seventh Circuit reversed both rulings on October 5, 1981 and remanded the cases to the district court with instructions that a three-judge court be convened. *Ryan v. State Board of Elections*, _____ F. 2d _____ (Nos. 81-2122 and 81-2394).

As adopted by the court, the Otto plan has a total deviation from the ideal population of its districts of 178 persons, or .03294 percent; the average deviation per district is 30 persons, or .00577 percent. App 13-14.

2) The Ryan plan (House Bill 1902) was passed by the Illinois House of Representatives. The Republican leadership of the House of Representatives developed this plan in consultation with a demographic expert after extensive, bipartisan committee hearings throughout the State on the issue of redistricting (Tr. 212-214). In addition, the three minority-dominated districts in the Ryan plan were developed by the Political Action Conference of Illinois (PACI), an intervening party and an organization composed of black business, labor, religious and community leaders, professionals and academicians. A broad cross-section of the black community in the Chicago area, including a caucus of black state legislators, endorsed these minority districts as drawn by PACI.

The expert who consulted in the preparation of the Ryan plan testified that he and the Republican leadership considered four criteria in developing the plan: (a) population equality; (b) non-retrogression in minority representation; (c) formation of congressional districts in areas to which population had shifted; and (d) respect for the integrity of political subdivision boundaries (Tr. 14, 23-26).

The Ryan plan has a total deviation from the ideal population of its districts of 768 persons, or .14797 percent; the average deviation per district is 136 persons, or .02626 percent. App. 12.

3) The Howlett-Ogilvie plan was developed by certain members of the Illinois congressional delegation after the Illinois General Assembly adjourned and after the House had already approved the Ryan plan. Former Illinois Governor Ogilvie (an intervenor) testified that he had proposed the Howlett-Ogilvie plan to the district court because it satisfied three criteria: 1) protection of certain incumbent members of the Illinois congressional delegation; 2) population equality; and 3) cohesiveness of 6

districts which exhibited respect for the integrity of political subdivision boundaries (Tr. 316-319). The Howlett-Ogilvie plan has a total deviation from the ideal population of its districts of 665 persons, or 12812 percent; the average deviation per district is 105 persons, or .02030 percent. App. 14-15.

The plan initially proposed by Ysursa, which had been passed by the Illinois Senate as Senate Bill 297, was withdrawn as the trial began. On the final day of trial, the Otto plaintiffs offered Otto Alternate No. II, which modified the Otto plan's configuration for Districts 1 and 2, but otherwise retained the configurations presented in the Otto map.*

On November 23, 1981, the district court, in a written Memorandum Opinion, with Chief Judge McGarr dissenting, ordered that the redistricting plan described as Otto plan with Alternate No. II govern the nomination and election of Members to the United States House of Representatives from Illinois, and further postponed the date for nominating petitions to be filed until the period December 28, 1981 to January 4, 1982 (rather than December 7-14, 1981). The Clerk of the court entered final judgment pursuant to these orders on December 3, 1981.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Introduction

This is the first redistricting case to reach this Court subsequent to the 1980 census. As such, it presents a unique opportunity for the Court to give additional guidance to the lower federal courts. That such guidance is imperative is demonstrated not only by the divided vote in the district court, but also by the serious deficiencies in the approach adopted by the majority. The district court, totally misapplying this Court's decision in *Gaffney v. Cummings*, 412 U.S. 735 (1973), created a novel doctrine of "political fairness" which required it to attempt to appraise the

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* The Otto plan also included an alternate configuration for Districts 1 and 2. Alternate No. 1 was presented with the rest of the Otto map. Other than statistical data, little testimony was offered on Alternate No. 1.

partisan political impact of the various plans before the court. This approach opened the way for partisan political maneuvering, since the differences in the population deviations contained in the various plans before the district court were miniscule and each plan fell well within the population deviations previously approved by this Court. The plan imposed by the majority not only favors incumbents, but also, by extending congressional districts from the City of Chicago into the suburbs, has the additional effects of diluting the impact of black and Hispanic voters in the suburban areas and of generally diluting the votes of all suburban voters who live in these districts that overlap from Chicago into the suburbs.

All of these issues are substantial. All of them merit the immediate attention of this Court.

I.

THE DISTRICT COURT ERRED BY MISAPPLYING PRIOR DECISIONS OF THIS COURT TO CREATE A NOVEL "POLITICAL FAIRNESS" DOCTRINE WHICH IMPROPERLY INTRODUCED PARTISAN POLITICAL CONSIDERATIONS INTO THE COURT'S DELIBERATIONS.

The district court majority stated that "it would appear to be proper for us to prefer one plan over its rivals on the ground that it best insures that the partisan makeup of the Illinois congressional delegation will be a 'rough approximation of the statewide political strengths of the Democratic and Republican Parties.'" App. 19-20. This said, the district court then speculated about the outcome of the elections to be held under the plan which it adopted, in order to "best advance the goal of 'political fairness.'" App. 20.

The district court created its "political fairness" doctrine by totally misapplying this Court's decision in *Gaffney v. Cummings*, 412 U.S. 735, 752-754 (1973). *Gaffney* neither requires nor permits a court which is drafting its own congressional redistricting plan to take into account partisan considerations to ensure *that a plan is politically "fair." Rather, that decision holds only that a legislature's consideration of political fairness will not*

necessarily invalidate a redistricting plan. 412 U.S. at 754). Conversely, four members of this Court in *City of Mobile v. Bolden*, 446 U.S. 55, 78-79 (1980), stated that the Court's "decisions hold squarely" that political groups do not "have an independent constitutional claim to representation." In other words, "The Equal Protection Clause of the Fourteenth Amendment does not require proportional represenation as an imperative of political organization." 446 U.S. at 76-76.

A judicial undertaking to assure "political fairness" in a court-imposed redistricting plan is contrary to this Court's admonition in *Baker v. Carr*, 369 U.S. 186, 217 (1962), that federal courts should not consider political questions—that is, questions characterized by "a lack of judicially discoverable and manageable standards" by which the propriety of the court's evaluations may be judged. Thus, under *Baker* and *Gaffney*, questions concerning what constitutes "political fairness" in the partisan sense are solely within the province of political bodies, and are not properly within the province of a federal court.

The Ryan plaintiffs respectfully submit that a federal district court has absolutely no business deciding what is politically "fair" or desirable, or declaring the "appropriate" partisan makeup of a state's congressional delegation. These are political and legislative, not judicial, decisions. For this reason, there is no precedent for the district court's ill-advised political maneuvering. To the contrary, a series of other lower court decisions hold that challenges to legislatively created redistricting plans based on political "fairness" founds are non-justiciable because they are not subject to evaluation by judicially discoverable and ratior al standards.

For example, the district court in *Wendler v. Sone*, 350 F.Supp. 838, 840 (S.D. Fla. 1972) warned that evaluation of the partisan characteristics of a congressional redistricting plan

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* In his dissent, Chief Judge McGarr correctly declared that a federal court which imposes its own congressional redistricting plan "must remain uninfluenced by political considerations" (App. 25).

"would lead the federal courts into a new 'political thicket' of unmatched density." Relying upon this Court's decision in *Whitcomb v. Chavis*, 403 U.S. 124 (1971), the *Wendler* court declared that "in our view, the equalization of representation [for political parties] demanded is not constitutionally required." See also, *Russo v. Vacin*, 528 F.2d 27, 30 (7th Cir. 1976); *Cousins v. City Council of City of Chicago*, 466 F.2d 830, 844 (7th Cir.), *cert. denied*, 409 U.S. 893 (1972); *Sims v. Baggett*, 247 F.Supp. 96, 104 (M.D. Ala. 1965).

The district court majority's conclusion that the plan which it adopted is politically fair required the majority to engage in "[p]olitical prognostication [which] is a dangerous and futile exercise." *Skolnick v. State Electoral Board of Illinois*, 336 F.Supp. 839, 845 (N.D. Ill. 1971).* The *Skolnick* court continued: "Given the vagaries of electoral politics, and given the imperfect data available for predicting the outcome of elections, it would be unwise for the court to establish as a criterion for congressional redistricting the establishment of politically-balanced districts." 336 F.Supp. at 844. Similarly, the court in *Wendler* noted that "[v]oting statistics for past elections, relied upon by plaintiffs, can be grossly unreliable when used for prognostication" (*Wendler*, 350 F.Supp. at 840).

The district court's injection of partisan political considerations into the redistricting process under the guise of "political fairness" had a number of consequences.** In the first instance

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* Indeed, there was expert testimony in these consolidated cases that "the ability to predict . . . outcomes [of elections held under a particular redistricting plan] is perilous, at best." (Tr. 1024).

** The majority relied upon voting patterns in elections for the Trustees of the University of Illinois in arriving at its conclusion that Illinois has an almost equal number of Republicans and Democrats. Upon this "flimsy foundation" (McGarr, C.J., dissenting, App. 27) is built the argument that the Illnois congressional delegation should likewise reflect an equal number of Republicans and Democrates. Unfortunately for the district court majority's theory,

Footnote continued on next page.

the plan imposed by the district court strongly favored certain incumbent members of Congress. It is not surprising that the Court-adopted plan was strongly supported by two incumbent members of Congress from Chicago who were protected under the district court's plan.

The district court majority's "fairness' notion also required it to pair two Republican incumbents in the same district, so that has no chance of beating; to pair no two Democrats; and to chop up a cohesive, urban Downstate district in order to add Democrats to a neighboring rural district.** Most significantly, the plan adopted by the district court stretches Democrat-dominated congressional districts into the Republican-dominated suburbs of the City of Chicago in order to override the demographic reality of the decline in city population, justifying the loss of two Democratic city districts (Ryan Exhibit 19).

Thus, the district court's perversion of the *Gaffney* doctrine cast it into the midst of the political thicket and compelled it to base its decision at least in part on the basis of partisan political considerations. This is an appropriate function for the legislature, not for a federal district court.

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* *Continued*

however, elections in Illinois, particularly in recent years, have produced a 14-10 Republican majority in the Illinois congressional delegation. See Ryan Exhibit 18. In an effort to produce election results in accord with its theory, the majority simply decided to eliminate two seats traditionally held by Republicans. See discussion *infra*.

** Each of these characteristics of the court-imposed plan was admitted by the computer expert who consulted in the drafting of that plan (Tr. 304-309, 349-356).

II

THE DISTRICT COURT'S RULING, IN CONFLICT WITH THE DECISIONS OF OTHER DISTRICT COURTS, GAVE UNDUE WEIGHT TO MINISCULE DIFFERENCES IN THE MAXIMUM POPULATION DEVIATIONS AMONG THE DISTRICTS IN THE VARIOUS PLANS.

While the majority of the three-judge court properly ruled that the goal of "precise mathematical equality" in congressional district populations "must be of primary concern in assessing the plans presented to this court," *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-531 (1969), it erred by differentiating with "slide-rule precision," *White v. Weiser*, 412 U.S. 783, 798 (1973) (Powell, J., concurring) among the plans presented to it because *all* of the plans achieved virtually precise mathematical equality.

The majority recognized that, in the three plans presented to it, the highest average deviation from the ideal congressional district population of 519,021 was only 136 persons, or 0.02626 percent. App 11. The lowest average deviation was 30 persons. App. 14. Despite the infinitesimal range of 106 persons between these average deviations, the majority mechanically concluded that it must adopt the plan with the lowest deviation because it "best satisfies the constitutional standard" of one person, one vote. App. 15*

Indeed, the dissenting District Judge correctly stated that "[t]he several plans proposed and being considered by the Court all meet the criteria of numerical equality within acceptable limits, and this factor alone therefore is not a compelling basis for choosing among the plans." App. 24

The Ryan plaintiffs respectfully submit that, at a certain

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* In fact, the majority opinion does not find or even suggest that the other plans presented to it, including the Ryan plaintiffs' plan, failed to satisfy the one person, one vote standard in general, or the requirement of a "good-faith effort to achieve precise mathematical equality" in particular.

point—admittedly a low one—the size of deviations becomes meaningless for the purpose of choosing among alternative congressional redistricting plans. That point has clearly been reached in this case.

The creation of the Ryan plan, developed during a hectic, time-compressed legislative session, obviously manifests the Illinois legislature's good faith effort to achieve mathematical equality. Thus, the Ryan demographic and computer consultant testified that reduction of the plan's average deviation of 136 persons during the legislative session would have been extremely impractical "because . . . we were engaged in a rather dynamic process, whereby these bills were constantly changing—and going any lower would have slowed us down so that we couldn't react to these shifts" in time to meet the deadline of June 30, 1981 adjournment of the General Assembly (Tr. 30).

Secondly, the extremely low average deviation of 0.02626 percent of the Ryan plan, achieved under the most difficult circumstances, clearly passes constitutional muster. In *White v. Weiser*, 412 U.S. 783 (1973), this Court rejected a congressional redistricting proposal in which the average district's deviation from precise mathematical equality was 0.06 percent, but accepted a plan which had a 0.035 percent deviation, a deviation higher than that of the Ryan plan. In fact, no court, prior to the instant case, has ever rejected a plan with a deviation below 0.06 percent.

Finally, the *reductio ad absurdum* quality of the majority's conclusion that the Otto plan was somehow constitutionally "better" than the Ryan plan is dramatized by the unanimous testimony that the Ryan deviation could have been eliminated immediately after the court's opinion. Thus, if the district court had adopted the Ryan plaintiffs' plan, but insisted upon further reductions in the plan's population deviations, the expert witnesses for the Ryan plaintiffs and Otto both agreed that this task could have been accomplished for the district court within a matter of hours, or at most a few days (Tr. 236, 1050).

Significantly, no decision of this court or of any other court,

prior to the district court's ruling in these consolidated cases, had declared that the one person, one vote rule requires a court which reviews alternative congressional redistricting plans to select the plan which has the lowest population deviations. In fact, there are numerous district court decisions to the contrary.

For example, in *Skolnick v. State Electoral Board of Illinois*, 336 F.Supp. 839, 842 n.2 (N.D.Ill. 1971), the district court noted that the plan which it adopted was only third best out of the four alternatives before it in terms of population equality. The *Skolnick* decision stated that "the variances in each plan are so small that the only way to distinguish among them is to consider what non-population factors went into the drawing of each (336 F.Supp. at 843). Here, as in *Skolnick*, non-population factors are the only way to distinguish among the three plans in these consolidated cases.

The congressional redistricting case of *Donnelly v. Meskill*, 345 F.Supp. 962 (D.Conn. 1972), is likewise contrary to the majority's decision in the instant case. In *Donnelly*, the parties presented three competing plans for proposed adoption by the court. The court noted that "[t]he population variations between these three plans are small, both numerically and percentagewise, ranging from 1 to 200 people maximum deviation between the largest and smallest districts, and from 0% to 0.04%, quite possibly with the margins of probable error inherent in the census data." 345 F.Supp. at 964. All plans therefore achieved "virtually complete population equality" 345 F.Supp. at 965. Significantly, the court adopted the plan which provided for the *largest* population deviations of the three competing plans.*

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* In a comparable case, *Drum v. Scott*, 337 F.Supp. 588, 590 (M.D.N.C. 1972), the court interpreted the "precise mathematical equality" rule of *Kirkpatrick v. Preisler* as follows: "We do not think that a good faith effort means that the scheme chosen must be that which results in the most numerically equal of all possible plans. If that were the test, there would be no room for legislative judgment and discretion; a computer would suffice."

As the majority opinion noted (App. 10-11), four members of this Court, joined by numerous commentators, have stated that the decisions demanding "precise mathematical equality" among district populations "are unduly rigid and unwarranted applications of the Equal Protection Clause which will unnecessarily involve the courts in the abrasive task of drawing district lines." *Kirkpatrick v. Preisler*, 394 U.S. 526, 553 (1969) (White, J., dissenting). Justice White seemed to foresee the district court's decision in these consolidated cases when he predicted that "the courts will now be engaged in quibbling disputes over such questions as whether a plan with a 1% variation is 'better' than one with a larger variation, say 1.1% or even 2%." *Id.* at 556. Justice Powell, joined by the Chief Justice and Justice Rehnquist, later echoed Justice White's misgivings about "attempting to hold any reapportionment scheme—state or congressional—to slide-rule precision." *White v. Weiser*, 412 U.S. 783, 798 (1973) (Powell, J., concurring).

Indeed, one commentator has noted that this Court's decision in *Gaffney v. Cummings* "acknowledged the practical problems which had doomed precise mathematical equality" as a standard in state legislative redistricting cases. Leventhal, *Courts and Political Thickets*, 77 Colum. L. Rev. 345, 352 (1977). Such a standard is no less impractical in congressional redistricting cases. In *all* types of redistricting, "[a]n unrealistic overemphasis on raw population figures, a mere nose count in the districts, may submerge . . . other [important, legitimate state] considerations and itself furnish a ready tool for ignoring factors that in day-to-day operation are important to an acceptable representation and apportionment arrangement." *Gaffney v. Cummings*, 412 U.S. 735, 749 (1973). See generally N. Polsby (ed.), *Reapportionment in the 1970s* (1971).

Moreover, blind adherence to mathematical perfection in redistricting cases can lead to serious evils. Population equality is a double-edged sword. As Justice (then Judge) Stevens warned in *Cousins v. City Council of City of Chicago*, 446 F. 2d 830 (7th Cir. 1972), "[T]he worst examples of gerrymandering might well occur even with numerical equality." *Id.* at 851 n.17 (Stevens, J.,

dissenting). Quoting Justice Harlan's dissent in *Wells v. Rockefeller*, 394 U.S. 542, 551 (1969), Justice Stevens continued:

> "The fact of the matter is that the rule of absolute equality is perfectly compatible with 'gerrymandering' of the worst sort. *A computer may grind out district lines which can totally frustrate the popular will on an overwhelming number of critical issues.*" 466 F. 2d at 851 n.17 (emphasis added).

Indeed, as this Court recognized in *Gaffney v. Cummings*, 412 U.S. 735, 751 (1973), it is a basic reality in redistricting cases that:

> "legislative districts may be equal or substantially equal in population and *still* be vulnerable under the Fourteenth Amendment. A districting statute otherwise acceptable, may be invalid because it fences out a racial group so as to deprive them of their pre-existing . . . vote." (emphasis added.)*

Aside from creating the serious risk of partisan gerrymandering and eliminating from judicial consideration such discretionary, non-population factors as respect for the integrity of political subdivision boundaries and due deference to state legislative and community input and objectives, insistence upon slide-rule precision in congressional redistricting is simply impractical.

In the context of state legislative redistricting, this Court stated in *Gaffney v. Cummings*, 412 U.S. 735, 745-746 (1973) that the census data upon which redistricting plans typically are based are inherently inexact:

> "These figures may be as accurate as such immense undertakings can be, but they are inherently less than absolutely accurate. Those who know about such things recognize this

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* *Accord, Wyche v. Madison Parish Police Jury*, 635 F. 2d 1151, 1159 (5th Cir. 1981). ("[S]atisfaction of the quantitative, one person, one vote requirement does not insure equality in all the aspects of political representation.")

fact, and, unless they are to be wholly ignored, it makes little sense to conclude from relatively minor 'census population' variations among legislative districts that any person's vote is being substantially diluted. The 'population' of a legislative district is just not that knowable to be used for such refined judgments."

Specifically, the Court noted that an error of one or two percent in the count of the total population is to be expected and that the United States Bureau of the Census itself estimated that its "1970 census had an undercoverage rate of 2.5%." *Gaffney v. Cummings*, 412 U.S. 735, 745-746 nn. 10, 11 (1973). It is respectfully submitted that the Court should take judicial notice of allegations of even more significant undercoverage in the 1980 census.*

In short, while the accuracy of census population figures has improved with each passing decennium, the census still is imperfect, especially as it pertains to minorities, and should not be used as a bench mark for requiring numerical perfection in congressional district boundary drawing. Indeed, it has been suggested that census figures may have to be adjusted for use in preparing legislative boundaries. *See Young v. Klutznick*, 652 F.2d 617, 624 (6th Cir. 1981).

The majority's embrace of the plan demonstrating "the least deviation from the ideal district population mandated by the 1980 Census" (App. 15) was obviously based on a misapprehension of the value of census figures and the margin of error those figures permit. As between the three plans before the three-judge court, all were substantially equal in their adherence to census figures and must therefore be judged by other criteria.

* Indeed, this Court currently has before it two cases arising out of challenges to the accuracy of the 1980 census. *McNichols v. Baldridge*, No. 80-4376, *cert. granted* 49 U.S.L.W. 3806; *Baldridge v. Shapiro*, No. 80-1781, *cert. granted* 49 U.S.L.W. 3931. The phenomenon of census inaccuracy has already been judicially recognized in Illinois. *See Carey v. Klutznick*, 503 F. Supp. 874, 876 (N.D. Ill. 1980), where the court noted that of nearly 2 million household units in Cook County, Illinois, the Census Bureau failed in 1980 to classify 7,000, or .35% of those units.

III

THE COURT-ORDERED PLAN PACKS SUBURBAN BLACKS AND HISPANICS INTO MINORITY-CONTROLLED DISTRICTS DOMINATED BY THE CITY OF CHICAGO, THEREBY DILUTING THE IMPACT OF MINORITIES ON CONGRESSIONAL ELECTIONS IN THE SUBURBS.

The district court stated that "[t]he primary non-numerical factor" which it considered as a matter of discretion was the issue of "minority representation." App. 15. Based upon certain carefully selected evidence and testimony adduced at the trial, the court concluded that the congressional redistricting plan which it adopted "creates the greatest likelihood of maintaining the number of districts where minority residents can elect a representative of their choice." App. 18.

However, the plan imposed by the court below obtains a higher proportion of blacks than the Ryan plan in certain districts only by unnecessarily packing black suburbanites into districts already dominated by black residents of the City of Chicago. The Ryan plaintiffs respectfully submit that this is a subtle, but nevertheless unconstitutional, form of racial discrimination.

The Otto plan expert testified that he gave special consideration to blacks and Hispanics who had moved from the City of Chicago (or elsewhere) to the suburban areas surrounding Chicago (Tr. 252-253, 257). The Otto plan proponents apparently believed that if Chicago congressional districts stopped at the city line, then the blacks who now live in the suburbs would not be represented by a black member of Congress. Therefore, Otto Congressional Districts Two and Seven were intentionally extended into the suburbs to "track" black movement from the city (Tr 252); in other words, once suburban blacks were found, the Otto proponents tacked them onto black-dominated city districts.

The proponents of this "track and tack" theory of redistricting apparently believe that all blacks, regardless of where they live,

must be represented by a black member of Congress as a matter of constitutional entitlement. The Otto proponents, and apparently the district court majority, must view suburban blacks as having more in common with city blacks than with suburban whites, presuming that color of skin is more important than all other socioeconomic characteristics, interests and goals combined.

The result of this erroneous analysis, as manifested in the redistricting plan imposed by the district court majority, is a sophisticated form of dilution of minority representation. By unnecesarily packing suburban blacks and Hispanics into minority districts dominated by the City of Chicago, the plan of the Court below dilutes the potential impact of minorities on congressional elections in the suburbs. Congressman Augustus A. Savage testified that "one of the major ways they [opponents of equal voting rights for blacks] have tried to dilute or prevent the natural growth of black population, and conversion into political representation, is to draw maps into the suburbs" (Tr. 895).

The Otto computer expert admitted that the effect of the plan is to remove black citizens from participation in congressional contests in Chicago's suburbs (Tr. 311), placing them in city districts which are already predominantly black. However, in discussing St. Louis-area districts, this expert stated that a similarly small proportion of blacks would "have a greater impact" politically if they were not included in an already substantially black district, but instead included in a predominantly white district (Tr. 356). In fact, according to a long-time black political activist, the blacks whom the district court's plan removes from suburban districts already have a growing influence in those districts as to "who should represent them" (Tr. 588-589). Thus, the effect of the plan "is to dilute the potential black growth and influence" in the suburbs (Tr. 577). This is a subtle, sophisticated form of racial discrimination, but it is discrimination nevertheless. *See Lane v. Wilson*, 307 U.S. 268, 275 (1939).

Lawrence H. Tribe, professor of law at Harvard University analyzed the impact of the "track and tack" approach adopted by the court below in the following terms:

> "[A] minority might insure some representation even in a district where it could not come close to electing a candidate who espoused its views without reservation; the minority could help elect the candidate whose views were least obnoxious to its members. Of course, if there were clearly dichotomized minorities and majorities—and if voters never cast wayward ballots—the minority might still be completely denied representation. But these factual assumptions defy the facts of political life; there are many types of interests and many gradations of opinion, with the result that a process of accommodation is generally undertaken in which even small minorities can successfully vie for influence."

Tribe, *American Constitutional Law* 758 (1978).

In short, the plan imposed by the district court majority "tacks" suburban blacks onto city districts in which blacks already are able to elect representatives of their choice. This wastes the votes of the suburban blacks, who are deprived of their existing opportunity to influence suburban congressional elections in the manner described by Professor Tribe. The district court's plan is a 1981 version of the racial discrimination condemned by this Court in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). Instead of *excluding* blacks to destroy their votes, the district court majority in these consolidated cases has *included* black votes to weaken and dilute them, thereby accomplishing the same result. Both the process and the result are "uncouth" and unconstitutional. *Gomillion v. Lightfoot*, 364 U.S. 339, 340 (1960).

IV

THE DISTRICT COURT FAILED, CONTRARY TO *WHITE V. WEISER*, 412 U.S. 783 (1973), TO ACCORD APPROPRIATE WEIGHT TO STATE POLICY AND THE WILL OF THE PEOPLE BY REJECTION OF A PLAN THAT WAS THE SUBJECT OF EXTENSIVE PUBLIC DISCUSSION AND APPROVAL BY ONE HOUSE OF THE ILLINOIS LEGISLATURE.

The district court acknowledged that "[o]f the three plans before us, only the Ryan plan has been considered by either house of the Illinois General Assembly. App. 21." In fact, the Ryan plan, House Bill 1902, was the only plan before the district court which passed either house; the Senate-approved plan, Senate Bill 297, was withdrawn by the Ysursa plaintiffs prior to the trial. App. 6.

The district court abused its discretion by failing to give any weight to the approval of the Ryan plan by the House of Representatives of the State of Illinois. The majority explained that it was not impressed by the "slim margin"* by which the House adopted its "proffered current policy." App. 21. Of course, this conveniently ignores the fact that the plan which the district court imposed was not approved by *any* legislative body, by either a slim or a substantial margin.

In *White v. Weiser*, 412 U.S. 783, 794-795 (1973), this Court stated: "From the beginning, we have recognized that 'reapportionment is primarily a matter for legislative consideration . . .' *Reynolds v. Sims*, 377 U.S. 533, 586 (1964)." Accordingly, wherever possible, a federal court in a congressional redistricting case must give due deference to the intentions of state legislators when the court chooses a redistricting plan.

* The district court's effort to look behind the approval of House Bill 1902 to determine the *margin* by which the House approved it again thrust the court into the political thicket. The Ryan plaintiffs respectfully submit that a court should consider only the *fact* of legislative approval, rather than to assess the *quality* of that approval.

The same district court which decided this case noted with approval in *Skolnick v. State Electoral Board of Illinois*, 336 F.Supp. 839, 842 (N.D.Ill. 1971), that the congressional redistricting map which it adopted "was, with one minor exception, the same as the one passed by the Illinois House [of Representatives] and introduced into the Senate earlier this year." Thus, where there is "[s]ome evidence of the will of the people of [the state] . . . and their elected representatives," district courts have properly given serious consideration to this factor. *Preisler v. Secretary of State of Missouri*, 341 F.Supp. 1158, 1161 (W.D.Mo.), *aff'd sub nom. Danforth v. United States*, 407 U.S. 901 (1972). See *Donnelly v. Meskill*, 345 F.Supp. 962, 964 (D.Conn., 1972).

"Before preparing what is now the Ryan plan, the bipartisan House Select Committee on Reapportionment held a series of six public hearing sthroughout the State to learn the will of the people concerning congressional redistricting (Tr. 212-214). The House of Representatives sought to reflect this will in House Bill 1902 (Tr. 226). The bill was adopted with the bipartisan support of Republicans and certain black Democrats (Tr. 191).

The redistricting plan adopted by the district court was neither approved, nor even considered, by the General Assembly of the State of Illinois or any of its committees. In fact, the plan was composed well after the filing of the complaints in these consolidated cases; it wwas drafted and approved behind closed doors by a handful of persons without any public input whatsoever.

By contrast, the Ryan plan was the subject of intense public discussion and debate before it was adopted in final form by the Illinois House of Representatives. For example, the Ryan plan was heavily influenced by the intervenor Political Action Conference of Illinois (PACI), an organization composed of business, labor, religious and community leaders, professionals and academicians. PACI was formed in 1979 "to enhance or retain black political participation in the city of Chicago, and the State of Illinois" (Tr. 559-560). PACI's proposed Congressional Districts

One, Two and Seven are incorporated virtually intact in the Ryan plan (Tr. 174-175).

There is no evidence in the record that *any* black or minority community group or organization opposes the PACI plan. Accordingly, it would seem fair to say that the PACI plan to a considerable extent represents "the will of the people" in the black community. By contrast, the proponents of the plan adopted by the district court presented *no* evidence whatsoever that even a single black or Hispanic person even *saw* their plan before it was presented to the district court.

The district court totally ignored the absence of *any* public input into, or approval of, the redistricting plan which it adopted. Instead, the majority weakly offered that "Otto II incorporates district configurations which have the support of two of the incumbent black representatives to Congress." App. 18. The weight given to the non-specific endorsement of two unidentified politicians is another example of the district court's wholly inappropriate venture into partisan political engineering.

V

THE COURT-ORDERED PLAN'S UNNECESSARY AND WHOLESALE FRAGMENTATION OF THE CHICAGO-SUBURBAN BOUNDARY CONFLICTS WITH THE ESTABLISHED REDISTRICTING PRINCIPLE THAT REQUIRES RESPECT FOR EXISTING POLITICAL SUBDIVISIONS.

The plan adopted by the district court totally ignores the political boundary between the City of Chicago and its suburbs (Tr. 1012-1016). Without any legitimate justification, seven of the eight congressional districts which begin in the city under the court's plan end up in the suburbs; the eighth is wholly contained within the city limits (Otto Exhibit 72A).

In contrast, under the Ryan plan, only three congressional districts which begin in the City of Chicago end up in the suburbs (Tr. 44-45). The total suburban population in these three districts

is about 109,000 (Otto Exhibit 80), or almost exactly the number required to bring the population of six city districts up to the ideal district population of 519,021.* Under the plan adopted by the district court, about 1,148,000 suburban residents are drawn into Chicago districts (Otto Exhibit 72A).

The reason for the Otto plan's unjustified fragmentation of the Chicago-suburban boundaries is obvious. Because of the decline in the population of the City of Chicago over the last decade, it would lose two congressional seats if district lines were drawn on a politically neutral basis (Ryan Exhibit 19). In order to maintain Chicago's power, however, at the expense of the rapidly growing suburban areas surrounding Chicago, seven districts in the plan approved by the district court extend outward from Chicago into the suburban areas. The ultimate effect is to produce districts dominated by voters in the City of Chicago and to "waste" the votes of suburban residents of these districts.

This Court has "underscored the danger of apportionment structures that contain a built-in bias tending to favor particular geographic areas or political interests. . . ." *Abate v. Mundt*, 403 U.S. 182, 185-86 (1971). So, also, in *Gaffney v. Cummings*, 412 U.S. 735, 751 (1973), the Court warned against redistricting plans that "minimize or cancel out the voting strength of racial or political elements of the voting population." (Emphasis added.) A "built-in" bias favoring the city of Chicago is precisely what the district court's plan contains. The effect of indiscriminately merging areas having "totally dissimilar interests" *Lucas v. Forty-Fourth General Assembly*, 377 U.S. 713, 757 (1964) (Stewart, J., dissenging), is to fence out the suburban population from full participation in the political process. *See United Jewish Organizations v. Carey*, 430 U.S. 144, 165 (1977).

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* Chicago now has a population of about 3,005,000 which would support 5.72 congressional districts with an ideal population of 519,021 (Tr. 563). In other words, 28 percent of an ideal district, or about 109,000 persons, would have to be drawn from the suburbs into one or more Chicago-dominated districts in order to bring six city districts up to the ideal population.

In other words, the obvious effect of unwarranted political subdivision fragmentation is impermissible gerrymandering. As this Court stated in *Reynolds v. Sims*, 377 U.S. 533, 578-79 (1964): "Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering."

Justice (then Judge) Stevens, in his dissenting opinion in *Cousins v. City Council of City of Chicago* 466 F.2d 830 (7th Cir. 1972), anticipated the very type of regional gerrymandering that has occurred in this case when he stated:

> "If the Republicans in Tuskegee, Alabama all lived in one neighborhood and if the Legislature of Alabama had enacted a law redefining the boundaries of the city so as to exclude, by means of an uncourt twnety-eight sided figure, all Republicans from the city, I am confident the Supreme Court would find the act constitutionally infirm." 466 F. 2d at 853 n.24

In this case, the district court majority has accomplished a similar result by excluding suburban voters from their communities and submerging them in heavily Democratic city districts.*

The majority in the district court apparently thought that it would be a useful exercise to attempt to blur the political and governmental distinction between the City of Chicago and the political subdivisions surrounding it, notwithstanding the fact that the people of the State of Illinois have not thought it desirable to create a metropolitan government for the Chicago area.**

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* It is indeed ironic that the same district court that decided the instant case approved a congressional redistricting plan in 1971 in part on the basis that it contained only one district that overlapped from Chicago to the suburbs and therefore represented "a good-faith effort to adhere to existing communities of interest and existing political boundaries." *Skolnick v. State Electoral Board of Illinois*, 336 F.Supp. 839, 845 (N.D. Ill. 1971).

** In fact, community sentiment concerning respect for the integrity of politi-

Footnote continued on next page.

This was plainly an illegitimate exercise of judicial power. As Chief Judge McGarr noted in dissent, "It is not the business of this court to work toward the 'crumbling' of political boundaries created by a legislature at other times and for other reasons. This *hearing is not an exercise of sociological preferences.*" *App. 25-26.*

It must be emphasized that this is not a case in which population deviations among districts are sought to be justified by the desirability of following political subdivision lines. Rather, the question is whether a district court, in adopting a redistricting plan, may reject a plan that meets the population deviation criterion *and* maintains political subdivisions substantially intact in favor of a plan that haphazardly fragments political subdivisions. In choosing the latter alternative, the district court plainly abused its discretion.

** *Continued*

cal subdivision boundaries, expressed at hearings before the Illinois House Select Committee on Reapportionment and at the trial by public officials of both major political parties, clearly favored the precept of containing congressional districts within the City of Chicago, and commencing suburban districts out from the boundaries of the city (Tr. 226; see Ryan Exhibit 8, pages 24-25, 37-38, 139-140, 150, 157-159, Tr. 214-215; see Ryan Exhibit 8, pages 65-83, 91-130, 360-420).

CONCLUSION

The action of the district court, by a divided vote, will severely impact the voters in the State of Illinois for the next decade. Indeed, the issues presented in this appeal will affect voters in states throughout the country. Therefore, appellants respectfully request this Court to note probable jurisdiction and to hear this appeal on an expedited basis.

Respectfully submitted,

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APPENDIX

APPENDIX

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 2 provides, in pertinent part:

Representatives shall be apportioned among the several States which may be included within this Union, according to their respective Numbers. . . . The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.

Article I, Section 4 provides, in pertinent part:

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof. . . .

The Fourteenth Amendment provides, in pertinent part:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Represenatives shall be apportioned among the several States according to their respective number, counting the whole number of persons in each State. . . .

The Fifteenth Amendment provides:

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

STATUTORY PROVISIONS INVOLVED

2 U.S.C. § 2a provides, in pertinent part:

(a) On the first day, or within one week thereafter, of the first regular session of the Eighty-second Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each state, excluding Indians not taxed, as ascertained under the seventeenth and each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportion, no State to receive less than one Member.

(b) Each State shall be entitled, in the Eighty-third Congress and in each Congress thereafter until the taking effect of a reapportionment under this section or subsequent statute, to the number of Representatives shown in the statement required by subsection (a) of this section, no State to receive less than one Member. It shall be the duty of the Clerk of the House of Representatives, within fifteen calendar days after the receipt of such statement to send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section. . . .

42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
	)	
ILLINOIS CONGRESSIONAL	)	
DISTRICTS	)	Master File No. 81 C 3915
REAPPORTIONMENT CASES	)	

MEMORANDUM OPINION

Before SPRECHER, Circuit Judge, MC GARR, Chief District Judge, and GETZENDANNER, District Judge.

SPRECHER, Circuit Judge, joined by GETZENDANNER, District Judge. The issue of Illinois congressional redistricting comes before this court once again because the Illinois General Assembly has failed to fulfill its duty to redraw congressional district lines that comport with the United States Constitution.[1] In April of this year the Illinois General Assembly received the results of the 1980 census. Although the population of the state of Illinois increased slightly from 1970 to 1980, it did so in smaller proportion than the United States as a whole. Consequently, instead of being entitled to twenty-four congressional districts on the basis of the 1970 census, Illinois is entitled to only twenty-two districts as of the 1980 census. The 1980 population being 11,418,461, the ideal population per district is 519,021 instead of the 1970 ideal population per district of 463,082. This fact constitutionally mandates a redistricting or reapportionment of existing districts.

The Supreme Court has recognized that " 'reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a

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[1] The Illinois congressional districts that obtained through the 1980 elections were approved by a three-judge district court in 1971 after the General Assembly had failed to come up with a constitutional plan. *See Skolnick v. State Electoral Board of Illinois*, 336 F.Supp. 839 (N.D.Ill. 1971).

legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so.' " *White v. Weiser*, 412 U.S. 783, 794-95 (1973) (quoting *Reynolds v. Sims*, 377 U.S. 533, 586 (1964)). The Illinois General Assembly as the legislative branch of "the people" of Illinois has the power to redistrict the state in a federal constitutional manner. U.S. CONST. art. I §§ 2 and 4. Nevertheless, no congressional redistricting bill has emerged from the Illinois General Assembly. Given the legislature's complete abdication of its constitutional responsibility, this court shoulders the burden of approving a reapportionment plan for Illinois.

I

On June 30, 1981, Earl Neil Otto, a resident of the Fourth Congressional District, brought a congressional reapportionment suit as No. 81 L 15260 in the Circuit Court of Cook County.

On July 1, Bernard J. Ysursa, a resident in the Southern District of Illinois, brought a congressional reapportionment suit as No. 81-5162 in the United States District Court for the Southern District of Illinois.

On July 10, George H. Ryan, a resident of the Seventeenth Congressional District, and others, including residents of the Second, Fourth and Seventh Congressional Districts, brought a congressional reapportionment suit as No. 81 C 3915 in the United States District Court for the Northern District of Illinois, Eastern Division.

On July 13, the *Ryan* plaintiffs filed a motion in federal district court to refer the case to the chief judge of the court of appeals for the convening of a three-judge court pursuant to 28 U.S.C. § 2284(a) (1978).[2] They also sought preliminarily to enjoin the

[2] 28 U.S.C. § 2284(a) (1978) provides:

> A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.

plaintiff from proceeding in the *Otto* case. The court denied both motions as well as an oral motion to reconsider. The *Ryan* plaintiffs filed notice of appeal to the court of appeals on July 13, 1981.

On July 20, the Attorney General of Illinois removed the *Otto* case to the Northern District of Illinois where it was assigned No. 81 C 4103. On August 7, the *Otto* plaintiff filed a motion to remand to the Circuit Court of Cook County. On August 18, the district court granted the motion. The court stayed its remand order, however, pending the outcome of any appeal from it or the *Ryan* case.

On August 20, the district court certified an immediate appeal to the court of appeals of the questions: (1) whether the doctrine of abstention applies to the *Otto* case; and (2) whether the district court could remand *Otto* on the discretionary ground of abstention.

On September 25, the *Ysursa* court requested the court of appeals to appoint a three-judge court under 28 U.S.C. § 2284(a) (1978).

On October 5, 1981, the court of appeals held that the district court lacked authority to remand the properly removed *Otto* case and that a three-judge court should be convened to entertain both the *Ryan* and *Otto* cases, *Ryan v. State Board of Elections*, ____ F. 2d____ (Nos. 81-21222 and 81-2394, decided October 5, 1981).

On October 8, the chief judge of the court of appeals appointed this three-judge court to hear and determine the *Otto*, *Ysursa* and *Ryan* cases.

On October 19, this court consolidated the three cases for trial; designated the consolidated cases as "In Re Illinois Congressional Districts Reapportionment Cases"; ordered the publication of notice of these proceedings in daily newspapers of Alton, Carbondale, Chicago, East St. Louis, Rockford and Springfield, Illinois; invited any person or group desiring to participate in the proceedings to file a petition to intervene; and set the trial date for November 5, 1981.

As a result of the published notice, petitions to intervene were filed by, and intervention was granted to, Eleanor T. Colson, a resident of the Third Congressional District; Michael Howlett, former Illinois Secretary of State, and Richard T. Ogilvie, former Illinois Governor; John S. Jackson III, a resident of the Twenty-Fourth Congressional District; Augustus A. Savage, the Representative from the Second Congressional District; Harold Washington, the Representative from the First Congressional District; the Political Action Conference of Illinois (PACI), a not-for-profit political action organization composed of black leaders and citizens residing primarily in the Chicago metropolitan area; and Robert McClory, the Representative from the Thirteenth District.

Evidence was heard over five days, beginning on November 5 and ending November 11. Three maps originally were presented to the court: the Ryan plan, which had been passed by the Illinois House of Representatives; the Otto plan;[3] and the Howlett-Ogilvie plan. The original Howlett-Ogilvie plan was modified in regard to Districts 1, 2 and 5 on the fourth day of trial, and was thereafter referred to as the Howlett-Ogilvie amended plan. On the final day of trial, the Otto plaintiffs offered Otto Alternate No. II, which modified the Otto plan's configuration for Districts 1 and 2, but otherwise retained the configurations presented in the Otto map. The map initially proposed by Ysursa, which had been passed by the Illinois Senate, was withdrawn at the beginning of trial. The court heard a total of twenty-four witnesses, including four experts and five congresspersons. Post-trial briefs were submitted by the parties on November 16.

At the conclusion of the hearing, counsel for the parties seemed in agreement that no major factual differences exist among the parties inasmuch as the only crucial facts are the 1980 census figures which everyone must accept. The differences among the

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[3] The Otto plan also included an alternate configuration for Districts 1 and 2. Alternate No. 1 was presented with the rest of the Otto map. Other than statistical data, little testimony was offered on Alternate No. 1.

three proffered maps lie in the interpretation of the applicable principles of law which we must make in selecting one of those maps. This memorandum opinion therefore includes our findings of fact and conclusions of law, which necessarily must intertwine.

II

Article I, § 2 of the Constitution, which provides that Representatives shall be chosen "by the People of the several States" and shall be "apportioned among the several States . . . according to their respective Numbers," makes "equal representation for equal numbers of people the fundamental goal for the House of Representatives." *Wesberry v. Sanders,* 376 U.S. 1, 18 (1964). In *Wesberry,* Georgia's Fifth Congressional District had two to three times as much population as the other nine congressional districts. *Id.* at 2. The Constitution requires, the Court held, that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Id.* at 7-8 (footnote omitted). "While it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives." *Id.* at 18.

In the handful of congressional reapportionment cases decided since *Wesberry,* the Supreme Court has indicated that numerical equality continues to be of paramount concern. In *Kirkpatrick v. Preisler,* 394 U.S. 526 (1969), the Court affirmed the unconstitutionality of a Missouri reapportionment statute which contained variations of 3.13% above, and 2.84% below, the mathematical ideal. The average percentage deviation from the ideal was 1.6%. In absolute numbers, this was a difference of 13,542 persons above, and 12,260 below, the ideal population of 431,981. *Id.* at 528-29. Such a view would defeat the goal of equal representation by encouraging legislators to aim only for the permissible range, rather than for absolute equality, and it would ignore differences among and within the states. *Id.* Practically, it would be difficult to set a *de minimis* standard in other than an arbitrary fashion. Instead, the Court reaffirmed *Wesberry* and restated the "as

nearly as is practicable" standard as "a good-faith effort to achieve precise mathematical equality." *Id.* "[O]nly the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown" are permissible. *Id.* at 531.

In the Court's view, the variations in the Missouri districts were avoidable, especially in light of the district court's findings that the state legislature had relied on alternate, less accurate data than the official census figures in drawing the plan; that a plan with lower population variance had been rejected by the legislature; and that simple adjustments to the plan would produce more equal districts. *Id.* at 531-32. Missouri offered several reasons for the variations: the desire to maintain distinct economic and social areas; the dictates of compromise in the "legislative interplay" required to pass the plan; the avoidance of fragmenting political subdivisions; estimated differences in the percentage of eligible voters in some districts; projected population shifts; and aesthetic compactness. The Court rejected all these justifications as unsatisfactory.[4] *Id.* at 533-36.

In the companion case to *Kirkpatrick, Wells v. Rockefeller,* 394 U.S. 542 (1969), the Court found that the state legislature had neither engaged in a "good faith" effort to achieve mathematical equality nor could the legislature justify district variations. *Id.* at 546. Lack of good faith was evidenced by the New York legislature's decision to draw districts primarily with reference to seven state regions with identifiable interests. Interest grouping thus supplanted the constitutional requirement of numerical equality. The resulting districts included deviations of 6.488% above, and

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[4] With the exception of population projections and differences in the numbers of eligible voters, the Court found the justifications offered constitutionally deficient. *Id.* at 533-36. On the two remaining categories, the Court found that there were insufficient data to uphold the justifications. *Id.* at 534-35. Projected population shifts could be used to justify district variations, but only if conclusions regarding shifts were based on competent and thorough data applied systematically throughout the state. *Id.* at 535. The Court declined to decide whether reapportionment could be based on the number of eligible voters as opposed to total population. *Id.*

6.608% below, the ideal population. *Id.* at 549. In absolute numbers, this was a range of 26,556 above, and 27,047 below, the ideal population of 409,324 per district. The Court found these variations were not redeemed by New York's interest grouping goal, for the same reason that justification was rejected in *Kirkpatrick*: to permit strong interest groups to be better represented would be " 'antithetical to the basic premise of the constitutional command to provide equal representation.' " *Id.* at 546. Similarly, following political subdivisions was insufficient justification for the variations.*Id.* .

The Court's decision in the most recent reapportionment case, *White v. Weiser*, 412 U.S. 783 (1973), indicates a potential limit to the Court's adherence to the goal of mathematical equality. In *White* the Court affirmed in part, and reversed and remanded in part, the district court's decisions on three plans for reapportionment of Texas' congressional districts. The first plan was a legislatively approved plan. S.B. 1, which included districts 2.43% above, and 1.7% below, the ideal population per district. The absolute variance was 11,326 above, and 7,949 below, the ideal district population of 466,530. The total percentage deviation was 4.13% or 19,275 persons; the average percentage deviation was .745% or 3,421 persons. *Id.* at 785. The second plan, Plan B, generally followed the districts approved by the legislature in S.B.1, but with adjustments to achieve smaller deviations from ideal district population. Plan B included districts .086% above, and .063% below, the ideal population. The absolute variance was 400 above and 296 below the ideal. The total percentage deviation was .149% or 696 persons. *Id.* at 786-87. Plan C disregarded the lines drawn by the legislature, and was drawn solely with the goal of reaching lower population deviations. The districts varied from .139% above, and .145% below, the ideal population. The absolute variance was 648 above, and 675 below, the ideal district population. The total percentage deviation was .284% or 1,318 persons. *Id.* at 787.

The district court found S.B. 1 unconstitutional, relying on *Kirkpatrick*, and adopted Plan C without an explanation of why this plan was preferable to Plan B. The Supreme Court affirmed

the finding of unconstitutionality of S.B. 1 on the ground that the deviations in that plan were avoidable. *Id.* at 790. The Court pointed out in a footnote that two bills with lower deviations had been proposed and failed in the Texas House: "their very existence, indicates that it was possible and practicable to construct a redistricting scheme with lower population deviations." *Id.* at 790 n.9. The Court also found no sufficient justifications for the deviations: the desire to maintain political boundaries was no more acceptable than in *Kirkpatrick* or *Wells*, and the goal of preserving the seats of incumbents was achieved with lower population deviations by Plan B. The Court therefore had no difficulty in affirming the district court's decision of S.B. 1.

On the issue of whether the district court properly adopted Plan C, however, the Court reversed that decision in light of the failure by the court to articulate why Plan C was chosen over Plan B. *Id.* at 797. In comparing the plans, the Court found Plan B to be superior, absent any justification for choosing Plan C. The Court's opinion rested most strongly on the consideration that Plan B followed the expression of state legislative intent and policy contained in S.B. 1, while significantly lowering the deviations from the ideal district population. *Id.* at 795. By such analysis, mathematical equality in this case appears to have taken a secondary role to adherence to, or reflection of, state policy as expressed by the legislature. The Court made only two passing references that Plan B had lower numerical deviations than Plan C, *Id.* at 796, 797 n. 16, when, according to *Kirkpatrick* and *Wells*, this alone would be sufficient reason to approve Plan B.[5] *Kirkpatrick* and *Wells* were expressly reaffirmed, yet at the same time the goal of equality was described in less absolute terms: "It

[5] The concurring opinions raised precisely this issue. Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, indicated his dissatisfaction with the strict mathematical standard in *Kirkpatrick* and *Wells*, but said that those cases must be followed unless the Court reconsiders the standard. 412 U.S. at 798 (Powell, J., concurring). Justice Marshall, on the other hand supported the strict standard of *Kirkpatrick* and *Wells*, as a neutral means for courts to analyze various plans, and would have judged the Texas plans, and would have judged the Texas plans solely on that basis. *Id.* at 798-99. (Marshall, J., concurring).

is clear, however, that at some point or level in size, population variances *do* import invidious devaluation of the individual's vote and represent a failure to accord him fair and effective representation." *Id.* at 792-93.[6]

The opinion in *White*, while clouding the issue of the appropriate analysis of reapportionment, retains the goal of mathematical equality underlying "one person, one vote." The importance of this standard has also been recognized in other opinions of the Court as the "preeminent, if not the sole, criterion on which to adjudge constitutionality" in congressional reapportionment, as opposed to state legislative reapportionment. *Chapman v. Meier*, 420 U.S. 1, 23 (1975); *See also Gaffney vs. Cummings*, 412 U.S. 735 (1973); *Mahan v. Howell*, 410 U.S. (1973). This standard therefore must be of primary concern in assessing the plans presented to this court.

The Ryan plaintiffs presented a reapportionment plan with a total deviation percentage of .14797%; an average deviation percentage of .02626%; total population deviation of 768; and average population deviation of 136.[7]

The Otto plaintiffs presented a reapportionment plan which had a total deviation percentage of .02851%; average deviation percentage of .00535%; total population deviation of 148; and

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[6] Justice White, the author of the opinion in *White*, dissented in *Kirkpatrick* and *Wells*, criticizing the Court's strict adherence to the goal of mathematical equality. *Wells v. Rockefeller*, 394 U.S. 542, 553-56 (1969); *Kirkpatrick v. Preisler*, 394 U.S. 525 (1969). *See also Kirkpatrick v. Preisler*, 394 U.S. 525, 536-41 (1969) (Fortas, J., concurring). Commentators have also been critical of the Court's preoccupation with mathematical equality and the lack of other criteria to analyze reapportionment. *See* N. POLSBY (ed.), REAPPORTIONMENT IN THE 1970s (1971).

[7]

RYAN PLAN

District	% Deviation	Population Deviation
1	-.00635	-33
2	-.06492	-337
3	.00211	11
4	.05298	275
5	.08304	431

Footnote continued on next page.

average population deviation of 27.[5] The Otto plaintiffs offered two alternate configurations for Districts 1 and 2, which are predominantly black districts located in the city of Chicago. These alternatives did not affect the configurations and deviations of the other twenty districts in the Otto plan. Otto Alternate I was offered in map form but without supporting data on percentage and numerical deviations; therefore, we need not

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[5] *Continued*

Ryan Plan Continued

District	% Deviation	Population Deviation
6	.01001	52
7	-.00134	-7
8	-.01464	-76
9	.01136	59
10	-.03680	-191
11	.06820	354
12	-.05664	-294
13	.00366	19
14	-.01830	-95
15	-.00096	-5
16	-.00173	-9
17	-.01175	-61
18	-.05895	-306
19	.02658	138
20	-.01656	-86
21	.00500	26
22	.02581	134

Total Deviation % .14797
Average Deviation % .02626
Total Population Deviation 728
Average Population Deviation 136

Highest Deviations:

Above Ideal: District 5 .08304 431
Below Ideal: District 2 -.06492 -337

[6]

Otto Plan

District	% Deviation	Population Deviation
1	-.00404	-21

Footnote continued on next page.

further discuss that proposed modification.[9] Otto Alternate II moved forty-five persons between Districts 1 and 2 as a result of proposing a different configuration for those districts. This altered the overall plan figures only slightly: as modified by Alternate II, the Otto Plan has a total deviation percentage of .03294%; average deviation percentage of .00577%; total popula-

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* *Continued*

Otto Plan Continued

District	% Deviation	Population Deviation
2	-.00867	-45
3	.01213	63
4	-.00308	-16
5	-.00963	-50
6	.00231	12
7	.00250	13
8	.00250	13
9	.00828	43
10	-.00115	-6
11	-.00500	-26
12	-.00250	-13
13	-.00385	-20
14	-.00115	-6
15	-.00500	-26
16	.00269	14
17	.01560	81
18	.00096	5
19	.01175	61
20	-.00115	-6
21	-.01290	-67
22	-.00077	-4

Total Deviation % .02851
Average Deviation% .00535
Total Population Deviation 148
Average Population Deviation 27

Highest Deviations:

Above Ideal:	District 17	.01560	81
Below Ideal:	District 21	-.01290	-67

[9] Furthermore, as noted above, *supra* note 3, little further testimony was heard on Otto Alternate I. The only explanation offered for this configuration was that it was drawn to include in the proposed District 1 the residence of the incumbent congressman in the current District 1. Tr. 261-62.

tion deviation of 178; average population deviation of 30.[10]

Finally, the Howlett-Ogilvie plaintiffs presented an amended plan with a total deviation percentage of .12812%; an average deviation percentage of .02030%; total population deviation of 665; and average population deviation of 105.[11]

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[10] Otto II has the following figures for Districts 1 and 2:

	% Deviation	Population Deviation
District 1	.00462	224
District 2	-.01734	-90

[11]

Howlett-Ogilvie Amended Plan

District	% Deviation	Population Deviation
1	.02485	129
2	.00077	4
3	-.02350	-122
4	.00616	32
5	-.00211	-11
6	-.03699	-192
7	.03294	171
8	-.05780	-300
9	.00443	23
10	-.02697	-140
11	-.01117	-58
12	-.00578	-30
13	-.00751	-39
14	-.01233	-64
15	-.01233	-64
16	-.01021	-53
17	-.00019	-1
18	.07032	365
19	-.01656	-86
20	.05298	275
21	.00500	26
22	.02581	134

Footnote continued on next page.

We find that the Otto plan, either as originally presented or as modified by Alternate II, has the least deviation from the ideal district population mandated by the 1980 census and therefore best satisfies the constitutional standard. Furthermore, the Otto plan is supported by discretionary considerations apart from the numerical standard.[12] On the basis of the numerical standard and the discretionary considerations we conclude that the Otto plan as amended by Alternate II (hereinafter referred to as Otto II) best satisfies the command of Article I, § 2 of the Constitution.

III

Although mathematical equality is the most important consideration in reapportionment, the Supreme Court has acknowledged that other factors may be weighed in drafting an otherwise constitutional congressional redistricting plan. *See White v. Weiser*, 412 U.S. 783 (1973). The parties have offered testimony about various factors which were taken into account in drafting their plans. These considerations merit the careful scrutiny of this court. We believe that on the basis of these discretionary factors, as under the numerical standard, the Otto II plan is the best alternative for Illinois reapportionment.

A

The primary non-numerical factor testified to at trial was minority representation. Much of the testimony related to representation of blacks in the Chicago metropolitan area and

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[11] *Continued*

Total Deviation % .12812
Average Deviation % .02030
Total Population Deviation 665
Average Population Deviation 105

Highest Deviations:

Above Ideal:	District 18	.07032	365
Below Ideal:	District 8	-.05780	-300

[12] *See* Part III *infra*.

black population growth and movement in the area over the past decade. There are currently three black representatives in the twenty-four member Illinois congressional delegation. These three representatives were elected from districts 1, 2 and 7 drawn in the 1970 reapportionment. The 1980 election was the first time that three black representatives were chosen.

The state of Illinois has not been designated as a covered jurisdiction under Section 4(b) of the Voting Rights Act of 1965, 42 U.S.C. § 1973b(b) (Supp. 1981), and therefore is not subject to Section 5 of that Act, 42 U.S.C. § 1973c (Supp. 1981), which requires certain procedures to prevent voting standards, practices and procedures from including a racially discriminatory purpose or effect. *City of Rome v. United States*, 446 U.S. 156, 172 (1980); *Beer v. United States*, 425 U.S. 130, 141 (1976). Voting Rights Act cases are therefore not applicable here to disqualify any map or plan before us.

Also we need not consider all of the troublesome questions raised but not conclusively settled by the plurality and other opinions in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), as to the constitutional need for evidence of discriminatory intent or purpose as well as discriminatory effect or impact, and the kind and burden of proof as to those issues.[13] Inasmuch as we heard no direct evidence of discriminatory intent but only of discriminatory impact, we cannot with any assurance constitutionally disqualify any map or plan before us on racial grounds.

In selecting one of the three maps or plans before us, however, there is no reason why we should not apply guidelines afforded by the constitutional cases. Although there is no constitutional right

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[13] "Because the leading opinion did not command a majority, it remains uncertain exactly what evidence will be considered sufficient in vote dilution cases." The Supreme Court, 1979 Term, 94 HARV.L.REV. 1, 149 (1980). *City of Mobile* considers discriminatory vote dilution under the fourteenth and fifteenth Amendments whereas the present congressional redistricting case is based upon Article I, § 2 of the Constitution.

to proportional representation for racial minorities, drawing voting boundaries by means of racial gerrymandering violates the fifteenth amendment. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). An apportionment plan which operates to minimize or cancel out the voting strength of racial elements of the voting population might under the circumstances of a particular case violate the fourteenth amendment. *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965). Minimizing or cancelling out racial voting strength under those circumstances constitutes invidious discrimination. *Burns v. Richardson*, 384 U.S.73,88(1966). The federal courts have been vigilant in scrutinizing schemes conceived or operated to further racial discrimination. *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971). *See also White v. Regester*, 412 U.S. 755, 765-70 (1973) (multi-member state legislative districts unconstitutionally diluted the voting strength of a discrete group).

Districts suggested by the plans before the court, based on 1980 census figures, contain the following percentages of black to total population:

District	Ryan	Otto	Otto II	H-O
1	83.61%	92.35%	92.05%	57.20% (H-O 2)
2	75.21%	69.95%	70.25%	83.58% (H-O 1)
7	60.68%	66.85%	66.85%	60.98% (H-O 5)

Justice Marshall referred to minority vote dilution as "retrogression." *City of Mobile v. Bolden*, 446 U.S. 55, 140 n.39 (1980) (Marshall, J., dissenting). Based on some guidelines used by experts, a black percentage of 65% of total population is necessary in order to present a probability that a person chosen by black voters would be elected. [14] Under this guideline, only the bility of the election of the black choice;[15] under this standard the Otto and Otto II plans would present the probability that the Illinois black delegation will not retrogress. Some testimony indicated that a 60% black population would result in the proba-

[14] Tr. 72, 73, 258-59.

[15] Tr. 72, 1041

Otto and Ryan plans would prevent retrogression. The Otto plan, therefore, creates the greatest likelihood of maintaining the number of districts where minority residents can elect a represenative of their choice. The Otto II plan achieves this result to a slightly greater extent with respect to District 2.

Otto II also was supported by parties who testified as to the concerns of the black community in reapportionment. Samuel Patch, chairperson of the PACI committee on congressional redistricting, was one of the persons who aided in drawing Alternate II. The attorneys for PACI stated that this alternate configuration was "worthy of the court's consideration." Finally, Otto II incorporates district configurations which have the support of two of the incumbent black representatives to Congress.

Thus we conclude tht Otto II incorporates a district configuration which reflects the concerns of the black community and ensures that black persons have the best opportunity to elect a representative of their choice.

The Hispanic minority constitutes the second largest minority group in Chicago.[16] The Hispanic population is so dispersed throughout the city that it is virtually impossible to draw an otherwise constitutional district with a 60% to 65% Hispanic population in order to result in the probability of the election of a candidate of the choice of Hispanic persons. The Otto II plan does succeed, however, in recognizing the two primary concentrations of Hispanic population in Chicago and locates those concentrations within two districts.[17]

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[16] Although the Howlett-Ogilvie intervenors suggested that black and Hispanic populations should be counted together as minority population to assess the impact of different redistricting plans, nothing in the record supports that position.

[17] The three plans had the following districts with substantial Hispanic populations:

District	Otto and Otto II	Ryan	H-O
8	31.62%	19.41% (Ryan 7)	30.93%
5	26.20%	22.16% (Ryan 5)	21.28%

Therefore, with respect to the Hispanic minority as well, the Otto II plan avoids fragmentation of the Hispanic community and insures that Hispanics will have the greatest potential to influence the election of represenatives of their choice.

B

The parties also presented testimony concerning political considerations. In *Gaffney v. Cummings*, 412 U.S. 735 (1973), the Supreme Court held that a state enacted plan of reapportionment for the Connecticut state legislature was not void simply because its design reflected a conscious effort to be "politically fair." The Court recognized that political considerations inevitably enter into any redistricting effort. *Id.* at 752-4. Accordingly it was deemed permissible for a plan to be drawn "with the conscious intent to create a districting plan that would achieve a rough approximation of the statewide political strengths of the Democratic and Republican parties." *Id.* at 752. To the extent, then, that the logic of *Gaffney* applies to federal congressional redistricting,[18] it would appear to be proper for us to prefer one plan over its rivals on the ground that it best insures that the partisan makeup of the Illinois congressional delegation will be a "rough

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[18] *Gaffney* was a state legislative reapportionment case based upon the Equal Protection Clause of the fourteenth amendment. The decision therefore did not directly decide any questions associated with congressional redistricting governed by Article I, § 2. A "dichotomy between the two lines of cases has consistently been maintained." *Mahan v. Howell*, 410 U.S. 315, 322 (1973). In *White v. Weiser*, 412 U.S. 783 (1973), the Court intimated that avoidable population deviations (between congressional districts) might be justified by a desire "to promote 'constituency-representative relations,' a policy frankly aimed at maintaining existing relationships between incumbent congressmen and their constituents and preserving the seniority the members of the State's delegation have achieved in the United States House of Representatives." *Id.* at 791 (footnote omitted). Political considerations might thus be sufficient cause for choosing one plan from among several, each of which we assume might have been constitutionally enacted by the Illinois Legislature.

approximation of the statewide political strengths of the Democratic and Republican Parties."

An "approximation of statewide political strength" in Illinois can be made, according to the experts, by looking at the results of the University of Illinois Board of Trustees elections. These results indicate that Illinois is a "swing" state, that it is split roughly fifty-fifty between the major political parties. Projections based upon these same results further indicate that congressional elections based upon the Otto maps will most closely result in an Illinois delegation mirroring this partisan division. Thus, if *Gaffney* is applicable to federal congressional redistricting matters, the Otto plans are preferable as they best advance the goal of "political fairness."

C

Another factor to be considered in this case is whether the state of Illinois has expressed a policy or preference for a particular congressional reapportionment plan and what weight we should give to any such preference. In *White v. Weiser*, 412 U.S. 783 (1973), the Supreme Court stated:

> Just as a federal district court, in the context of legislative reapportionment, should follow the policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature, whenever adherenece to state policy does not detract from the requirements of the Federal Constitution, we hold that a district court should similarly honor state policies in the context of congressional reapportionment. In fashioning a reapportionment plan or in choosing among plans, a district court should not pre-empt the legislative task nor "intrude upon state policy any more than necessary."

Id. at 795 (citation omitted). Therefore if there is a state policy favoring a particular congressional reapportionment plan, this court should attempt to honor it. To do so, we must determine whether any state policy or preference has been expressed.

Of the three plans before us, only the Ryan plan has been considered by either house of the Illinois General Assembly. On June 23, 1981, the Ryan plan, H.B. 1902, passed the Illinois House of Representatives with a bare majority of eighty-nine votes. The Illinois Senate adjourned without having voted on the bill.

We do not believe that the endorsement of the Ryan plan by such a slim margin in the Illinois House constitutes a clear expression of Illinois' reapportionment policy.[19] In *Sixty-seventh Minnesota State Senate v. Beens*, 406 U.S. 187 (1972), a state legislative reapportionment bill passed both houses of the Minnesota legislature but was vetoed by the governor. The Supreme Court found that the legislature's bill and the governor's veto represented merely "proffered current polic[ies]" rather than clear expressions of a state policy. *Id.* at 197. Similarly, we find that the Illinois House's approval of the Ryan plan is nothing more than the proffered current policy of one house of the Illinois General Assembly.[20] Illinois has not expressed a policy with regard to congressional reapportionment. The fact that the Ryan plan passed the Illinois House of Representatives, therefore, does not require us to accept that plan.

D

Other factors were raised in the course of the trial, but were not as vigorously pursued by the parties. None of these factors distinguish one plan over any other. First, there was testimony con-

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[19] The current Illinois congressional districts, ordered by a three-judge district court ten years ago, had received "the overwhelming approval of one house of the legislature." *Skolnick v. State Electoral Board of Illinois*, 336 F.Supp. 839, 846 (N.D.Ill. 1971). The Illinois House at that time consisted of 177 members, 3 from each of 59 districts. The "overwhelming approval" was 148 to 1. *Id.* at 842.

[20] The Illinois Senate adopted a plan that was initially presented by plaintiff Ysursa, but that plan was withdrawn at the beginning of trial. That the Illinois Senate endorsed a proposal inconsistent with the House plan reinforces our conclusion that Illinois has expressed no coherent policy with regard to congressional reapportionment.

cerning the sensitivity of each map to political subdivisions. Some testimony was directed at emphasizing the different economic and social differences between the city of Chicago and the remainder of the state of Illinois. "But to accept population variances, large or small, in order to create districts with specific interest orientations is antithetical to the basic premise of the constitutional command to provide equal representation for equal numbers of people." *Kirkpatrick v. Preisler*, 394 U.S. 525, 533 (1969).

For the most part the Ryan map stops at the city of Chicago boundaries whereas the Otto and Howlett-Ogilvie maps cross those boundaries frequently. The *Kirkpatrick* Court rejected the argument that deviations from mathematical equality are justified by an "attempt to avoid fragmenting political subdivisions by drawing congressional district lines along existing county, municipal, or other political subdivision boundaries." *Kirkpatrick v. Preisler*, 394 U.S. 525, 533-34 (1969)

Finally, we heard some testimony in support of the Ryan plan as to isolated projected population shifts. The *Kirkpatrick* Court held that "[w]here these shifts can be predicted with a high degree of accuracy," they can properly be considered, but added that "[f]indings as to population trends must be thoroughly documented and applied throughout the state in a systematic, not *ad hoc* manner." *Kirkpatrick v. Preisler*, 394 U.S. 525, 535 (1969). The record in our case more nearly resembles the one commented on in *White v. Weiser*, 412 U.S. 783, 792, n.12 (1973), where the Court noted that the "record is barren, with the exception of scattered and vague assertions in deposition testimony, of adequate documentation of the projected population shifts and firm evidence that the alleged shifts were in fact relied upon."

IV

All of the maps were changed to some extent during the trial, principally to correct errors, to improve numbers, or to more nearly satisfy the black community.[21] Although each map may

[21] The Otto plan was expanded to include Alternates I and II.

have passed constitutional muster if it had been fully aproved by the state legislature, we are constrained to apply more mechanical precision. Based upon what we have considered the most important guidelines, we accept the Otto map with Alternate No. II (Otto Ex. No. 92).

In order to give the parties and intervenors time to appeal and the State Board of Elections time to implement this decision, we believe that we should postpone the primary filing dates by three weeks. *Mahan v. Howell*, 410 U.S. 315, 332 (1973); *Sixty-seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 201, n.11 (1972); *Connor v. Johnson, 402 U.S. 690, 693 (1971).*

ORDER

The foregoing memorandum opinion is hereby adopted as findings of fact and conclusions of law.

It is therefore ordered that the reapportionment plan described as Otto plan with Alternate No. II (Otto Ex. No. 92) is declared to meet all federal constitutional requirements; and it is further ordered that said plan of reapportionment govern the nomination and election of members of the House of Representatives of the United States Congress beginning with the 1982 primary and election and continuing thereafter until Illinois congressional districts are reapportioned in accordance with law.

It is further ordered that the defendant, Illinois State Board of Elections, in the performance of its duties and functions under the Illinois election laws, be governed by and comply with said plan of reapportionment accordingly.

It is further ordered that the primary filing dates established by state law be postponed from December 7 to December 14, 1981, to the period from December 28, 1981 to January 5, 1982.

Frank J. McGarr, Chief District Judge dissenting.

I agree with the principles of law so ably set forth in the majority opinion, and with the criteria derived therefrom to be applied by this court to the resolution of the controversy before us.

This court is charged with achieving distribution of the population of Illinois among Congressional Districts, such as to attain the one person one vote balance mandated by the Constitution. Our jurisdiction to do so depends upon the premise that it is constitutional rights we are here to enforce, as distinguished from the imposition of our political or sociological judgments upon this state.

The several plans proposed and being considered by the court all meet the criteria of numerical equality within acceptable limits, and this factor alone therefore is not a compelling basis for choosing among the plans. *White v. Weiser*, 412 U.S. 783 (1973). The decision in this case therefore must be made on other factors which the Supreme Court has decided may be considered in drafting any constitutional redistricting plan. These factors are generally grouped under the heading of political fairness, and it is in this area that the evidence and the arguments of the proponents largely concentrate.

It is my view that the following basic postulates must control any consideration of political fairness.

a. The black population in Chicago has in recent years achieved the election of three black representatives in Congress from three districts which for want of a better word have been referred to as a "safe" black congressional districts. Further the black population of Chicago since the last census has increased. It is therefore obvious that no redistricting plan is acceptable which does not leave the black community with three congressional districts from which they may elect a candidate of their choice.

b. The avoidance of the fragmentation of existing political subdivisions to the extent possible is also a major factor in the creation of a redistricting map. Political subdivisions are the natural and logical units and places of beginning for the creation of congressional districts, *Kirkpatrick v. Preisler*, 394 U.S. 526 (1967). Their boundaries may be transgressed only in pursuit of the higher goal of population equality, and they should not be deliberately breached in pursuit of sociological goals.

The inability of a politically divided Illinois legislature to reapportion this state, the candid denomination during the hearing of the Ryan Plan as the Republican Plan and the Otto II Plan[1] as the Democratic Plan, and the Howlett-Ogilvie Plan as the Republican-Democratic compromise plan all highlight the political atmosphere in which this reapportionment controversy takes place.

The Democratic Plan is calculated to eliminate two Republican members of the Illinois Congressional delegation. The Republican Plan is calculated to eliminate two Democratic members of the Illinois Congressional delegation. The Howlett-Ogilvie compromise eliminates one of each. This court obviously must remain uninfluenced by political considerations, but cannot ignore them. Both the Otto II Plan and the Ryan Plan propose a significant change in the political complexion of the Congressional delegation from Illinois, to be accomplished by judicial fiat neither necessitated nor supported by the evidence in the case.

The Otto II Plan has the further flaw of deliberately breaching the boundaries between city and suburbs. The support for this feature of the plan relies heavily upon the testimony of witnesses who advocate the "crumbling" of the wall of division between city and suburbs, and endorse the Otto II Plan as a step in the direction of erasing the barriers between these two segments of the population. There is no constitutional issue here. It is not the business of this court to work toward the "crumbling" of political

---

[1] I am referring to the Otto Plan as modified by Otto Alternate No. II (hereinafter referred to as Otto II).

boundaries created by a legislature at other times and for other reasons. This hearing is not an exercise in sociological preferences.

The philosophy of merging city and suburbs is a subject of considerable controversy. In other areas of the country the creation of "metro districts" has achieved this result by legislative action. Illinois has seen no disposition to create "metro districts" or to otherwise take legislative steps to minimize the meaning of the boundaries between political subdivisions. It is not the business of this court to substitute its judgment for the voters of Illinois and to achieve what is a sociological and not a political, and least of all, not a constitutional goal for this state. What the Otto witnesses see as a principal virtue of the Otto II Plan is indeed its principal flaw.

None of the proposed maps meet all the specific criteria which should be required by this court and I cannot approve any as they presently stand. The Howlett-Olilvie Plan alone produces the equitable result of reducing the congressional delegation by one Democrat and one Republican. It would have to be restructured, however, even beyond its late amendment during trial, to more certainly preserve three black congressional districts in Chicago.

In the area of the preservation of the constitutional right of the black community to retain the gains they have made, the Ryan Plan presents the strongest case. Its three city congressional districts, One, Two and Seven, meet the criteria for preserving black representation, in addition to having the approval of leaders and organizations representative of the black community. The Ryan Plan's fatal flaw is that it results in the elimination of two Democratic seats. The modification of this map which would achieve the elimination of one "safe" Democratic district and the elimination of one "safe" Republican district would save this plan and in the long run make it the most desirable.

The only significant contention in support of the Otto II proposal for judicial rebalancing of the Illinois Congressional dele-

gation to eliminate two Republican districts rather than one, is the argument that Illinois is a swing state, that is, a state with almost evenly balanced Democratic and Republican voters, a fact not reflected in the presently existing districts. The contention rests upon evidence of voting patterns in elections for University of Illinois Trustee, a race so colorless that it is argued that party affiliation is the only reason for voting, and can thus be measured by the vote. Upon this flimsy foundation is built the conclusion that such Democrats and Republicans as vote at all in this race being presumably evenly matched, the 1970 apportionment of the state by the court does not truly reflect the political realities of Illinois, and therefore this court must perforce redress the malapportionment of a decade ago. The evidence does not compel that conclusion, and the assumption by this court that it has the duty to redress a supposed imbalance created by a court redistricting the state ten years ago is unwarranted.

For the foregoing reasons I must dissent from the decision reached in the opinion of my distinguished colleagues on the court.

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:

ILLINOIS CONGRESSIONAL) Master File No.: 81 C 3915
REAPPORTIONMENT CASES)

ORDER

IT IS HEREBY ORDERED that the initial date for filing nominating petitions for Congress and for State Central Committee shall be December 28, 1981. The last date for filing nominating petitions for Congress and for State Central Committee shall be January 4, 1982. This order does not affect the filing dates for candidates for any other offices.

Enter:

/s/ *Frank J. McGarr*
Frank J. McGarr. Chief District Judge

Dated: November 25, 1981

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
ILLINOIS CONGRESSIONAL	)	Master File No. 81 C 3915
DISTRICTS	)	
REAPPORTIONMENT CASES)		

JUDGMENT

This action came on for trial before the Court, Honorable Robert A. Sprecher, Circuit Judge, Honorable Frank J. McGarr, Chief District Judge, and Honorable Susan Getzendanner, District Judge, presiding, all issues having been duly tried, all claims having been duly adjudicated, and a permanent injunction having been duly rendered in the form of a "Memorandum Opinion" issued on November 23, 1981.

IT IS ORDERED AND ADJUDGED that:

1. the reapportionment plan described as Otto plan with Alternate No. II (Otto Ex. No. 92) is declared to meet all federal constitutional requirements;

2. pursuant to this Court's permanent injunction, said plan of reapportionment shall govern the nomination and election of members of the House of Representatives of the United States Congress beginning with the 1982 primary and election and continuing thereafter until Illinois congressional districts are reapportioned in accordance with law;

3. the defendant, Illinois State Board of Elections, in the performance of its duties and functions under the Illinois election laws, shall be governed by and is permanently enjoined to comply with said plan of reapportionment accordingly; and

4. pursuant to this Court's permanent injunction, the initial date for filing nominating petitions for Congress and for State Central Committee shall be December 28, 1981. The last date for filing nominating petitions for Congress and for State Central Committee shall be January 4, 1982. This order does not affect the filing dates for candidates for any other offices.

Dated at Chicago, Illinois this 3rd day of December, 1981.

/s/ *Eugene Kolko*
Eugene Kolko, Clerk of Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
	)	
ILLINOIS CONGRESSIONAL DISTRICTS REAPPORTIONMENT CASES)	)	Master File No. 81 C 3915

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that George H. Ryan, Monica Faith Stewart, Arthur L. Turner, the House of Representatives of the State of Illinois, Mark Q. Rhoads, Hyman Schneider, Phil Schneider and Patrick Rea, plaintiffs in these consolidated cases, hereby appeal to the Supreme Court of the United States from the Judgment entered in this action on December 3, 1981.

This appeal is taken pursuant to 28 U.S.C. §1253.

Respectfully submitted,

/s/ James D. Wascher

One of the attorneys for the Ryan plaintiffs

DATED: December 3, 1981

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CERTIFICATE OF SERVICE

I do hereby certify that I caused to be served on the attorneys of record (see attached Service List) a true and correct copy of the Notice of Appeal to the Supreme Court of the United States. by mailing same this 3rd day of Dcember 1981.

/s/ *Anita Hoffman*
Anita Hoffman

SUBSCRIBED AND SWORN TO before me this 3rd day of December, 1981.

/s/ *Jean Beyer*
Jean Beyer, Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
	)	
ILLINOIS CONGRESSIONAL	)	
DISTRICTS	)	Master File No. 81 C 3915
REAPPORTIONMENT CASES)		

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:)

ILLINOIS CONGRESSIONAL)
DISTRICTS) Master File No. 81 C 3915
REAPPORTIONMENT CASES)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Robert McClory, a plaintiff in the above named action, hereby appeals to the Supreme Court of the United States from the order entered in this action on December 3, 1981.

This appeal is taken pursuant to 28 U.S.C. §1253.

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Motion to Dismiss or Affirm

Office - Supreme Court, U.S.
FILED
DEC 31 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-1068

In the

Supreme Court of the United States

OCTOBER TERM, 1981

GEORGE H. RYAN, et al.,

Plaintiff-Appellant,

vs.

EARL NEIL OTTO, et al.,

Defendant-Appellee.

No. 81-1077

ROBERT McCLORY,

Plaintiff-Appellant,

vs.

EARL NEIL OTTO, et al.,

Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

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Office Supreme Court, U.S.
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Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

MOTION TO AFFIRM OF APPELLEE, EARL NEIL OTTO

JURISDICTION

Appellee Earl Neil Otto agrees that this Court has jurisdiction to hear all issues in this case. He submits, however, that the Questions Presented in the Jurisdic-

tional Statements[1] do not accurately or fairly articulate any possible questions arising from the decision of the district court.[2] In any event, even as articulated, the questions are so insubstantial and are so controlled by well-settled precedents of this Court that further review or argument is not warranted. Consequently, appellee Otto respectfully moves this Court to affirm the comprehensive memorandum decision, and judgment entered thereon, of the district court pursuant to Rule 16(c) of the Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

1. Whether following extended consideration of the three proposed plans[3] presented during the hearing, the district court abused its discretion in adopting the Otto Plan, as amended by Alternate No. II, as preferable for the State of Illinois.

2. Did the district court err in giving consideration to the fact that the Otto plan best satisfied the numerical equality standard within the "one person-one vote" principle?

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[1] The Jurisdictional Statements filed by each of the appellants will be denominated herein as "Ryan J.S." or "McClory J.S.".

[2] Reference hereafter will be made to the decision of the majority of the three-judge panel as the "district court's decision". Where relevant, reference will be made specifically to the dissenting opinion.

[3] These plans will be characterized where appropriate as the "Otto plan" advanced by Appellee Otto, the "Ryan plan" advanced by Appellants Ryan and McClory, and the "Howlett-Ogilvie plan" advanced by certain members of the Illinois Congressional delegation from both major political parties.

3. Did the district court err in its determination that the plan it selected "ensures that black persons" in the City of Chicago as well as the suburbs of the City "have the best opportunity to elect a representative of their choice," and that the Hispanic minority "will have the greatest potential to influence the election of representatives of their choice."

4. Did the district court abuse its discretion in considering political fairness as a redistricting factor, having first determined that the Otto plan of the three plans presented best satisfied numerical equality within the "one person-one vote" principle and best insured against vote dilution of the Black and Hispanic minorities?

5. Is the "will of the people" necessarily manifested by the passage of the Ryan plan in the Illinois House of Representatives by a bare majority of 89 votes, where that chamber is controlled by a majority of 93 members of the major political party advancing the Ryan plan.

6. Is the court-ordered Otto plan unconstitutional for failing to adhere to more substate political subdivisions, including the boundary of the City of Chicago, as districting limitations?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Constitution of the United States and the statutes involved are set forth in the Appendix to the Ryan Jurisdictional Statement. (Ryan J.S., App. 1-2). Additionally, the Court should consider the change in the Illinois Constitution of 1970 as to political subdivision splitting in the redistricting process. The material provisions of the Constitutions of 1870 and 1970 are:

Article IV, section 7 of the Constitution of the State of Illinois of 1870, provided in pertinent part:

> "Representative districts shall be formed of contiguous compact territory, and shall contain, as nearly as practicable, a population equal to the representative ratio; outside of Cook County, such districts shall be bounded by County lines unless the population of any County entitles it to more than one representative district."

Article IV, section 3a, of the Constitution of the State of Illinois of 1970, provides in pertinent part:

> "Legislative Districts shall be compact, contiguous, and substantially equal in population."

SUMMARY OF THE ARGUMENT

There is nothing whatsoever "substantial" in the Jurisdictional Statements which warrants further review of the district court's decision. Not even the dissenting member of the Panel accepted Appellants' plan. It is *conceded* by the Appellants that:

1. The court-ordered plan, of all the plans, best satisfies the constitutional precept of numerical equality, the "one person-one vote" principle. (Ryan J.S., p.11; McClory J.S., p.5).

2. The court-ordered plan creates three districts which contain percentages of Black population of a higher proportion than any other plan. (Ryan J.S., p.17).

3. The Ryan plan was passed by only one chamber of the Illinois General Assembly (by a bare majority), a chamber controlled in numbers by the political party advancing the Ryan plan. (Ryan J.S., p. 20).

4. The district court determined, upon evidence presented at the hearing, that "to the extent" that political

fairness is an appropriate consideration following adherence to numerical equality and avoidance of minority voting dilution, the court-ordered plan was more politically fair than the other plans. (Ryan J.S., p. 9-10; McClory J.S., p.6).

As can be perceived immediately, appellants by imaginative rhetoric, must manufacture constitutional issues to attack a court-ordered plan which best adheres to *all* the traditional constitutional precepts denominated by this Court. It admittedly has numerical equality, provides the best opportunity for minority representation, and contains a political impact closely resembling the traditional strength of both major political parties in the state. With that statement, further words in support of this motion to affirm are unnecessary. In fairness to the district court, however, we stress the following:

1. The contention that *undue* weight (Ryan J.S., p.11) or excessive reliance (McClory J.S., p.5) was given to the Otto plan because it provided the least population deviation is not only inaccurate (see Memo. Op., Ryan J.S., App. 15),[4] but even if true, presents no constitutional ground for reversal. This Court, we submit, would expect a plan which best satisfies numerical equality to be an appropriate consideration of any district court.

2. Following the determination of which plan best satisfied numerical equality, it was appropriate for the district court to consider how each plan impacted upon minority representation. The district court painstakingly analyzed all the plans to determine which plan would more assured-

[4] The district court's extended memorandum opinion appears in the Ryan Jurisdictional Statement. Reference will be made to that opinion by citing to the Ryan Appendix.

ly guard against minority vote dilution or "retrogression" of *both* the Black *and* Hispanic minorities. It determined that the Otto plan with Alternative II would best ensure the probability that the Illinois Black delegation will not retrogress, and that Hispanics will have the greatest potential to influence the election of representatives of their choice. That determination was unquestionably correct. The percentages are expressly stated in the district court's opinion and are not contested here. (Memo. Op., Ryan J.S., App. 17 for the Black population, and App. 18 for the Hispanic population).

The suggestion that there exists in the court-ordered plan "a subtle" form of racial discrimination is absurd. It is built upon the suggestion that a concentration of approximately 36,000 Black suburban population within a district can somehow impact on congressional elections in a district containing an ideal numerical population of 519,021. The contention is not only absurd on its face, it was disputed by the overwhelming weight of the evidence at the hearing where several Black witnesses testified that the Ryan Plan actually discriminated against and disinfranchised that very suburban Black population.

3. The district court considered the factor of "political fairness" only *after* it had determined which plan best satisfied the factors of numerical equality and minority representation. Because evidence had been presented on this issue, the district court concluded, under this Court's decision in *Gaffney* v. *Cummings*, 412 U.S. 735 (1973), that "to the extent that the logic of *Gaffney* applies to federal congressional redistricting," from the evidence presented, the Otto plan "will most closely result in an Illinois delegation mirroring the partisan division in Illinois." (Memo. Op., Ryan J.S., App. 20). Appellants attack this conclusion, not from a "weight of evi-

dence" contention, but on the belief that the district court had "no business" considering this factor at all. (Ryan J.S., p. 9; McClory J.S., p. 6). Their contention that the district court's consideration of this factor was a "perversion of the *Gaffney* doctrine" in determining which of the three plans to accept (Ryan J.S., p. 10) flies in the face of this Court's express language in *Gaffney* and disregards plain common sense if the object of reapportionment is to achieve fairness.

4. The "will of the people" cannot be said to be expressed through the passage of a plan by a bare majority of one chamber of a state's General Assembly, particularly where that chamber is controlled by the party advancing the plan. With equal "logic" one could conclude that the plan which passed the Illinois Senate and which was advanced by the other major political party expressed the "will of the people." (Memo. Op., Ryan J.S. App. 21, n.20). This Court expressly stated in *Sixty-seventh Minnesota State Senate* v. *Beens*, 406 U.S. 187 (1972), that even greater legislative action than that which is involved in the instant case did not represent a clear expression of state policy.

5. The district court properly held that there was no constitutional requirement that the various plans give religious adherence in redistricting to substate political boundaries in the State including the boundary of the City of Chicago. Unqualified adherence to these boundaries in redistricting is contrary to the constitutional, legislative and decisional tradition within Illinois. In any event, the statistical difference between the plans as to adherence to political substate divisions is minimal and cannot establish a constitutional basis to reverse the district court's decision.

STATEMENT OF THE CASE

The district court's memorandum opinion adhered rigorously to the evidence in the Record presented during the five-day hearing. Appellants' Statement of the Case makes but a passing nod at the facts in the Record with no regard whatever to the standard of review.

Appellee Otto respectfully states that the issues presented in this appeal are neither complicated nor substantial. The resolution of these issues is controlled by long settled principles. The central issues in this case concern the appropriate factors of constitutional significance in redistricting, as outlined by this Court since 1961. It is undisputed that the district court expressly considered each of these factors in resolving which of the three plans submitted was most appropriate or preferable for Illinois. Appellants Ryan and McClory take issue with *how* certain of these factors were considered.

Apart from the Otto, Ysursa and Ryan parties plaintiff listed in the Ryan Statement (Ryan J.S., p. 3-4), several parties were given leave to intervene and actively participated in the trial. (The named defendants were essentially election officials within the State).

Following consolidation of the Otto, Ysursa and Ryan cases, and the convening of a three-judge panel pursuant to 28 U.S.C. 2284(a), the district court ordered the filing of pretrial memoranda and scheduled time for a hearing, with each party and intervenor placing his or her case in evidence subject to the cross-examination of the other parties and intervenors. Each party and intervenor was also provided an opportunity to present rebuttal evidence. The hearing ensued for five days, encompassing the testimony of 25 witnesses, a Record of 1083 pages, and the introduction and admission of over 120 exhibits.

The district court also ordered the filing of post-trial memoranda on November 16, 1981, and after taking the case under consideration for an additional seven days, entered its Memorandum Opinion November 23, 1981.

Because the issues raised on this appeal center in part on the weight of the evidence, a review of some of the evidence is pertinent.

The One Person-One Vote Principle

Three expert demographers or reapportioners were presented by the parties during the hearing: Thomas B. Hofeller by the proponents of the Ryan and Howlett-Ogilvie plans, Kimball W. Brace for the Otto plan, and Amy Ong Tsui for the intervenor Washington.

The final deviation rankings for each plan were the subject of examination and express statement by the district court in its decision. (Memo. Op., Ryan J.S., at App. 11-15). Notwithstanding the numerous amendments in the Ryan and the Howlett- Ogilvie plans, Dr. Hofeller had to concede in response to a question by the court that the Otto plan was nevertheless the best in terms of least deviation. (Hofeller, Tr. 1048). In seeking to explain why the average deviation in the Ryan plan did not measure up to the Otto plan, Dr. Hofeller stated that the Ryan plan was developed in the context of a legislative process and if they had had more time, they could perhaps have brought the population deviation down lower. When the court inquired as to the amendments during the trial, Dr. Hofeller simply concluded by stating that it was the Ryan proponents' feeling "that we had met the *de minimis* requirement of one man-one vote", (Hofeller, Tr. 1049).

Minority Representation

During the hearing all parties agreed that following the 1980 decennial census, the "formation of districts should follow the shift in population within the country and within the given states" as a result of the demographic changes between 1970 and 1980. (Hofeller, Tr. 17, 25; Knudson, Tr. 219).

Consistent with the theme of all plans being drafted to reflect the movement of Black and Hispanic population between 1970 and 1980, as well as future growth patterns (Stewart, Tr. 183), all parties agreed also that there had been a movement or migration of the Black population west and south within the City of Chicago and into the contiguous suburban areas west and south of the City of Chicago. Mr. Brace testified from Otto Exhibits 51, 52, and 68 showing unequivocally this phenomenon westward and southward. (Brace, Tr. 247-252). He further testified that the total population of Blacks in the Cook County suburbs as of the 1980 census was 145,000. This reflected an increase of approximately 65,000. (Brace, Tr. 312, 382). Edward Marciniak, a noted urbanologist, put the increase of Blacks in the suburbs within Cook County at 69,000. (Marciniak, Tr. 440). In any event, each demographer who testified indicated that the movement within the 1980's would substantially increase. (Marciniak, Tr. 410; Tsui, Tr. 991-992). In Mr. Marciniak's judgment, the number would double by 1990. (Marciniak, Tr. 410).

Inexplicably, neither the Ryan nor the Howlett-Ogilvie plans took any consideration of this undisputed movement of minorities. Dr. Hofeller testified he did not take into consideration the migration of Black and Hispanic persons from the City to the suburban areas, although he was aware of that movement. (Hofeller, Tr. 58-59). No

explanation whatsoever was presented in the testimony from the proponents of the Howlett-Ogilvie plan. Mrs. Tsui, the demographer presented by the intervenor Harold Washington, in direct response to a question by the Court, stated that the only plan which reflected that movement of Black population was the Otto plan. (Tsui, Tr. 1008). Mrs. Tsui also dispelled the notion that there was any possibility over the next ten years that the growth in the suburbs would be sufficient for minority populations to control or *even influence* the outcome of a Congressional election. (Tsui, Tr. 1010).

Several Black witnesses testified essentially that they could perceive no justifiable basis to fence out a large group of minority population in the western and southern suburbs and deny access to the political process which would permit them the opportunity of electing and being represented by a candidate of their choice. These included: Marty T. Bates (Tr. 463); Clifford B. Fletcher (Tr. 466); Wilbur N. Daniel (Tr. 474); Patricia Lucas (Tr. 480); Joseph W. Freelon (Tr. 542); and Cardiss Collins (Tr. 549).

Alternate No. II of the Otto plan was proposed following the testimony of Harold Washington, a distinguished Black incumbent Congressman from the First Congressional District. In the post-trial briefs filed with the district court the Washington intervenor indicated the Otto plan with Alternate II was worthy of the court's consideration.

Political Fairness

Both the Ryan and Otto proponents utilized political data with their demographics. (Hofeller, Tr. 14, 49, 54, 106; Brace Tr. 274-276). This data was retrieved in a precinct by precinct review of the results of several political

contests in the past few years which were then matched with the population data to predict the strength of the major political parties at a district by district level. While the political data for each political party differed somewhat in the formulation of both plans, as the foregoing demonstrates the conclusions from the data were virtually identical. Dr. Hofeller admitted that the conclusion of his data was that the Ryan plan would most likely produce thirteen Republican seats and nine Democratic seats. (Hofeller, Tr. 1034). That data does not appear in any of the Ryan exhibits, and in direct response to an inquiry of the court, Dr. Hofeller stated that the Ryan plan was not drawn with political fairness in mind. (Hofeller, Tr. 1051).

Although admitting that political fairness was not considered in drawing the Ryan map, and considering the political history of Illinois which he admitted to be a swing state politically, *i.e.*, neither predictably Democratic nor Republican in any given year, Dr. Hofeller insisted that advancing a plan which ultimately delivered thirteen or fourteen Republican districts out of a total of twenty-two was fair in his judgment. (Hofeller, Tr. 107).

Fragmentation Of Substate Political Divisions

Mr. Brace, on behalf of the Otto plan, stated that he considered avoiding fragmentation whenever possible, but this consideration necessarily came behind the first and second criteria, that is, equal population and minority representation. (Brace, Tr. 296-97).

Notwithstanding Dr. Hofeller's precept of the avoidance of fragmentation, he had to admit that it was not religiously followed in the Ryan plan. For example, the

City of Joliet was split between Republican and Democratic voters, apparently for no reason. Dr. Hofeller stated he would not have done it, but the Ryan plan had to pass the House. (Hofeller, Tr. 98-100). DuPage County was split into three districts. (Hofeller, Tr. 102). This split was *not* because of the necessities of the nature and size of the County. (Hofeller, Tr. 152).

It was the position of the Otto proponents, as expressed in the form of the plan itself and through the testimony of several witnesses that there should be no blind adherence to the City of Chicago border because of the population movement within the City and suburbs in the decade between 1970 and 1980. It was Mr. Brace's conclusion that it was not appropriate or desirable to exclude protrusion of districts over the City's boundary lines. (Brace, Tr. 246). Consequently, seven of the Otto districts extend beyond the City.

The "Will Of The People"

During the legislative session immediately succeeding the delivery of the census data to Illinois, the Republican members of the Illinois House of Representatives developed the Ryan plan (HB 1902), and succeeded in passing the bill in the House by a bare majority (89) with the help of 4 of 15 Black Democratic members. The Republican members of the House total 93. The Bill failed in the Senate which has a membership of a majority of Democrats (30).

ARGUMENT

Introduction

There is no issue of any constitutional validity presented in the Jurisdictional Statements. The district court in this case was not called upon to review the validity of a plan developed by a legislative body or commission. The court was required instead to approve or create a plan of its own. The court was presented with three proposed plans and adopted one of the plans as its own. This appeal seeks to test the validity of this court-ordered plan on a constitutional basis. Appellants may not properly ask this Court to choose again among the three plans, as they apparently seek to do in their Jurisdictional Statements.

I.

The District Court Properly Adhered To This Court's Admonition That Any Reapportionment Plan Must Conform To The Constitutional Standard Of Population Equality.

(Response To Ryan J.S., Pt. II, pp. 11-16; and McClory J.S., p. 5).

It is simply not true to state, as Appellants do, that the district court gave "blind adherence to mathematical perfection in redistricting" (Ryan J.S. p. 14) or determined that the differences in deviations among the plans "were its 'primary concerns'." (McClory J.S., p. 5). Nor is it accurate that the district court based its decision on a "misapprehension of the value of census figures and the margin of error those figures permit." (Ryan J.S., p. 11).

The district court devoted a considerable portion of its Opinion to an extensive review of this Court's prior decisions reflecting concern for the objective of "making equal representation for equal numbers of people the fundamental goal for the House of Representatives". (Memo Op. Ryan J.S., App. 7-11). The court held that the standard of mathematical equality underlying "one person, one vote" must be "of primary concern in assessing the plans presented to this court." (Id., App. 11).

The district court then reviewed carefully the extent to which each plan adhered to this standard (Id., App. 11-14), and concluded what was obvious from the evidence—that the Otto plan had "the least deviation from the ideal district population mandated by the 1980 census" and that it therefore best satisfied this constitutional standard. (Id., App. 15).

What is so significant, however, and what is totally ignored by Appellants, is that the district court then carefully considered all the other discretionary factors presented by the parties [*i.e.*, minority representation (III A of the Opinion), political considerations (III B), state policy or preference (III C), and adherence to political subdivisions and population projections (III D) (Id. App. 15-22)]. Having done so, the court concluded that "on the basis of the numerical standard *and* the discretionary considerations we conclude that Otto plan as amended by Alternate II . . . best satisfies the command of Article 1, 2 of the Constitution. (Emphasis added.) (Id., App. 15).

It is apparent therefore that the district court did *not* select the Otto plan simply because it provided the least deviation, although it certainly could have done so without creating a constitutional defect in its decision.

There is no decision of this Court or any court where a judicially determined plan has been reversed because of its close adherence to the standard of numerical equality. The logic of the district court's decision in this regard is merely strengthened by its conclusion that the Otto Plan also best satisfies, as it does, the other criteria.

The district court expressly considered *Wesberry* v. *Sanders*, 376 U.S. 1, 18 (1964); *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969); *Wells* v. *Rockfeller*, 394 U.S. 542 (1969); *White* v. *Weiser*, 412 U.S. 783 (1973); *Chapman* v. *Meier*, 420 U.S. 1, 23 (1975); *Gaffney* v. *Cummings*, 412 U.S. 735 (1973); and *Mahan* v. *Howell*, 410 U.S. 315 (1973). (Ryan J.S., pp. App. 7-11). These are precisely the authorities advanced by Appellants in support of their contention that the court-ordered plan gives "undue weight" or "excessive reliance" upon the various plans' deviations from the ideal, while conceding that the court-ordered plan satisfies the one person, one vote principle.

Appellants also apparently contend that the court erred in using the census data as a "bench mark." (Ryan J.S., p. 16). This contention was never raised at the trial level. All parties used the same census data in the development of their respective plans. This Court has stated that the "most current available population data" is to be used. *City of Rome* v. *United States*, 446 U.S. 156, 186 (1980). The most current available population data is the census data utilized by the district court; any "imperfections" in the data must necessarily await another day.

In short, there is no possible constitutional basis to the numerical equality contentions.

II.

The Court-Ordered Plan Contains No Racial Discrimination, Subtle Or Otherwise.

(Response to Ryan J.S., Pt. III, pp. 17-19).

One of Otto's principal contentions at the hearing below was that the Ryan plan, in its desire to adhere religiously to the boundaries of the City of Chicago as a district border, for no justifiable reason "fenced out" large groups of Black population in the western and southern contiguous suburbs, and thereby denied these voters a reasonable opportunity to elect candidates of their choice. Several Black witnesses testified to this belief, including Cardiss Collins, an incumbent Black congresswoman. (Tr. 463, 466, 474, 480, 542 and 549).

Appellants translated this concern into a "track and tack" theory of redistricting where "all Blacks, regardless of where they live, must be represented by a Black member of Congress as a matter of entitlement." (Ryan J.S., pp. 17-18). This contention is simply absurd and, as demonstrated *infra*, is actually an afterthought.

All the Ryan and the intervenor PACI witnesses insisted that their principal objective as to minority representation was to retain three Black districts in the City of Chicago. When faced with the realization that their action might foreclose exercise of the franchise by Blacks in the contiguous suburbs, a variety of excuses were advanced. These included the following: Dr. Hofeller testified that a judgment had been made when he *received* the PACI plan that the districts be kept within the City (Tr. 59); that if he had had his choice he would have improved Ryan District 7 to increase the Black population percentage (60%) somewhat (Tr. 74); that it was not necessary to reach out into the suburbs (Tr. 75); and

that the reason the suburban Blacks were ignored was there was a marked increase of Blacks in Chicago which overrides any increase in the surrounding townships (Tr. 89). Monica Faith Stewart, an independent Black Democratic Representative, stated that it was her understanding that there were not enough numbers in the suburban minorities to draw a solid Black district in the suburbs and to do so would involve picking up more White populations (Tr. 180). Samuel A. Patch, referred to by Ryan as a "long-time Black political activist" (Ryan J.S., p. 18), testified that PACI wanted to ensure equal representation to *Chicago's* Blacks and that was their priority with respect to the suburban Blacks (Tr. 581); that Blacks in the suburbs are growing and they have an influence or are able to influence what their political lives should be or who should represent them (Tr. 588-589, 634); and that in drawing Ryan and PACI proposed District 7, they wanted to retain sixty percent Blacks in District 7 and were opposed to picking up additional Whites if the district were to go into the western suburbs (Tr. 576). [As noted by the district court, this same long time Black political activist was one of the persons who aided in drawing Otto Alternate II which was adopted by the court and is now condemned as subtly racist. (Memo. Op., Ryan J.S., App. 18)].

Finally, the "packing" contention was also raised at trial with respect to the alleged unnecessary inclusion of minority population in a single district, thereby wasting their votes. (Hofeller, Tr. 1030-31). That claim is repeated here, along with the "reaching out" contention, in a vain effort to respond to the failure of the Ryan plan to extend the franchise to two concentrations of suburban Blacks. Mr. Brace denied that Otto Districts 2 and 7 were or could possibly be held to be subject to a "packing"

allegation (Brace, Tr. 312, 384) and the facts support his testimony. While Otto District 7 has over six more percentage points than Ryan No. 7, it has a far smaller Hispanic population; that population is necessary in view of the desire of the Otto plan not to dilute Hispanic voting strength. When one also considers the concern of Mr. Patch to avoid an increased White population in the regentrification of south Dearborn Park and the North Loop area in the central part of the City, the packing contention disappears. (Tr. 575-76) Otto District 2 has a four percentage Black population *less* than the Ryan-PACI District 2, and Appellants have not complained of packing in Ryan District 2.

Appellants are also critical of Otto Districts 2 and 7 because, as articulated by their expert, bringing in suburban minority populations denied them the ability "to have any electoral influence whatsoever in the districts comprising the communities in which they live." (Hofeller, Tr. 1028). This should come as a surprise to Joseph Freelon, the Mayor of Maywood, and Patricia Lucas, who ran for Trustee in Oak Park, immediate suburbs west of the City. But the offensive nature of the criticism is seen in the testimony of all the witnesses, with the exception of Dr. Hofeller, who said there was *no possible way* within the next decade that Blacks in those suburban communities could control or even influence a congressional election in a predominantly suburban district. (Tsui, Tr. 1006-1010; Marciniak, Tr. 454-455; Brace, Tr. 391). This case involves *congressional* districts, each with an ideal population of 519,621. As Mr. Marciniak testified, Blacks do not change their political affiliation when they move, and nothing prevents them from participating in elections more local than congressional elections. In fact, they exercise their franchise to a greater extent. (Marciniak, Tr. 443-444, 451).

Mr. Brace testified to the intent and purpose of the Otto plan with respect to minority and other representation. Otto proposed Districts 2 and 7 were drawn to reflect the movement of Blacks westward and southward, both within and beyond the City borders, between 1970 and 1980. The percentages of Black majorities in those districts provide sufficient strength to preserve against retrogression and provide room for growth in the next ten years by extending the Districts into the south and west suburbs. (Brace, Tr. 261-267).

Otto Districts 5 and 8 were drawn to reflect the strong concentrations of Hispanic population in the City of Chicago and in the western suburbs. (Brace, Tr. 256-257). The Hispanic population is a subject which apparently deserved no treatment by the Appellants, although it did not escape the district court. (Memo Op., Ryan, J.S., App. 18-19) Because of the geographic placement of these concentrations, a minority district could not be drawn where the Hispanic population could predominantly influence the election within the district. The Hispanic concentrations are immediately to the north and south of a westward corridor in the center of the City which is almost exclusively Black. However, by placing the strength of these two Hispanic concentrations into two separate districts north and south of this Black concentration, the influence of the Hispanic population can best be felt. These are Districts 5 and 8 which also provide for the expected growth of the Hispanic population. (See Marciniak, Tr. 405-407).

Appellants make no comment whatever of their burden of proof on this issue, nor do they cite any authority on the issue. The district court, however, considered the most recent decisions of this Court, and expressly found

that there was no direct evidence of discriminatory intent. (Memo. Op., Ryan J.S., App. 16-17). In their Statements, Appellants seek to make a case for intential suburban Black voter dilution. Their burden in this regard is to show intentional and purposeful discrimination. *City of Mobile* v. *Bolden,* 446 U.S. 55 (1980). The overwhelming weight of the evidence unequivocally demonstrates no such intention.

Finally, Appellants' contention in this regard seems contrary to every other reported case on this issue. Traditionally, the contention centers on the failure to include concentrations of minority population within a district, thus resulting in the dilution of their voting strength because they are hereby fractured from other minority population. Appellants apparently suggest that the suburban Black population build for an impact on reapportionment in the suburbs in 1990. This is little solace for those who desire to vote in the '80's.

III.

The District Court Did Not Err In Considering The Political Fairness Of The Plans To The Extent That It Is A Relevant Discretionary Factor.

(Response to Ryan J.S. Pt. I, pp. 7-10 and McClory J.S., p. 6).

The district court's consideration of this factor was tentative at best. The issue of "political fairness," having been raised as an appropriate factor for consideration under the authority of *Gaffney* v. *Cummings,* 412 U.S. 735 (1973), was considered "*to the extent*" the logic of *Gaffney* applies to federal congressional redistricting or "*if*" *Gaffney* is applicable to federal congressional redistricting matters. (Memo Op., Ryan J.S., App. 19-20). In that event, the district court held that "it would appear

to be proper to prefer one plan over its rivals" which best insures, in the language of *Gaffney*, a "rough approximation of the statewide political strengths of the Democratic and Republican Parties." After a review of the evidence, the district court held the Otto plan "best advances the goal of 'political fairness'." (Id., at App. 20).

The evidence at trial revealed that the proponents of all the plans had virtually the same political data built into their computer systems which, upon retrieval, would reveal the estimate of political strength of each major political party within each district. The Ryan plan was developed by the Illinois House Republican staff, assisted by Dr. Hofeller, and, following a political give and take, was passed in the House as HB 1902. It delivered proposed districts with such an imbalance in favor of the Republicans (14-8) it was little wonder that, in response to an inquiry of the court, Dr. Hofeller admitted the Ryan plan was not drawn with political fairness in mind. (Hofeller, Tr. 1051). He also admitted that his political data, which contained in part the results of Board of Trustee races, revealed essentially the same political analysis of the proposed plans as the Otto data. (Hofeller, Tr. 54-56).

Mr. Brace, on the other hand, stated the Otto plan took into consideration political fairness and produced a result which fairly tracked the political history of the State. (Brace, Tr. 269-276, 1061). The exhibits admitted in evidence which address the political history of Illinois over 100 years demonstrate that it is a "swing" state at best, and that in any given year candidates from either major political party could capture the national and state offices, as well as either chamber of the General Assembly. (Otto Exs. 60, 61 and 64).

If, as claimed, the district court's tentative consideration of this factor under the express authority of *Gaffney* and *White* v. *Weiser,* 412 U.S. 783 (1973), is a "perversion" of that doctrine, as alleged, a conclusion which defies reason or justice, it can in no sense justify reversal in view of the court-ordered plan's qualification under all other constitutionally-mandated principles.

IV.

The District Court Gave Appropriate Consideration To The Ryan Plan's Passage In One Chamber Of The General Assembly Controlled As It Is By One Major Political Party By A Bare Majority.

(Response to Ryan J.S., Pt. IV, pp. 20-21).

The district court gave consideration to passage of the Ryan plan in the Illinois House of Representatives on June 23, 1981 by 89 votes, the precise number necessary for passage. The court felt, however, that the success of HB 1902 was a "proferred current policy" of one house rather than a clear expression of state policy, citing as authority this Court's decision in *Sixty-Seventh Minnesota State Senate* v. *Beens,* 406 U.S. 187 (1972). (Memo. Op., Ryan J.S., App. 20-21).

Without even a reference to *Beens,* Appellants contend "appropriate weight" was not given to the single house passage of the Ryan plan. (Ryan J.S., at 20-22; see also McClory J.S., at 6). They contend that the court also failed to give consideration to the "will of the people" in the Black community as expressed in the Ryan plan in view of the influence of PACI. These contentions have absolutely no merit.

The Illinois General Assembly includes 93 Republican members of the House (with a controlling vote of 89)

and 30 Democratic members of the Senate (with a controlling vote of 30). The Ryan plan, sponsored by the Republicans, passed the House with a vote of 89; the Ysursa plan, sponsored by the Democrats (and withdrawn in this case), passed the Senate with a vote of 30. The Ysursa plan failed in the House, and the Ryan plan was not even called in the Senate. It would be inaccurate to suggest that either plan expressed the "will of the people" of Illinois. (Memo. Op., Ryan J.S., App. 2d, n. 20).

As for the "will of the people" in the Black community, it became apparent during the trial that the Ryan and PACI minority districts were drawn for a purpose other than what appeared at first glance. Samuel Patch, chairperson of PACI on congressional redistricting and the principal architect of the districts' configurations, criticized Otto proposed District 1 because it had taken away the independence of the old First Congressional District and put it into "controlled" areas or wards. His statement was that District 1 should go to 95th Street to reach Black independent communities. He further testified that preserving the strength of Black independent politics was one of the purposes in drawing the PACI map (Patch, Tr. 651-659.) He then admitted that although four independent Black legislators had voted for the Ryan map in the Illinois House of Representatives, eleven Black legislators had voted against it. This testimony, and no doubt other testimony in the record, led one member of the district court to observe: "I am beginning to perceive . . . that the PACI map is an independent Black map." When that inquiry was presented directly by the district court to Mr. Patch, his only response was: "Well, it preserves Black representation." (Patch, Tr. 683). Mr. Patch further testified that Otto Alternative No. 1 to Districts 1 and 2 was only a slight improvement for independent voters

in the area. Samuel Patch later aided in drawing Otto Alternate II, which was adopted by the district court, and determined to be worthy of consideration by the Intervenor Harold Washington. (Washington post-trial memorandum, p. 8; Brace Tr. 1070). The will of the Black community would seem to have been satisfied.

Finally, reference is made by Appellants to *Skolnick* v. *State Electoral Board of Illinois*, 336 F.Supp. 839, 842 (N.D. Ill. 1971). As noted by the district court, the plan in that case passed the Illinois House by a vote of 148 to 1. (Memo. Op., Ryan J.S., App. 21 n. 19). If the fact of passage in one chamber is relevant at all, the overwhelming vote in *Skolnick* distinguishes it from the instant case.

V.

There Is No Wholesale And Unnecessary Fragmentation Of Political Subdivisions In the Court-Ordered Plan.

(Response to Ryan J.S. Pt. V, pp. 22-25; McClory J.S., pp. 5-6).

This contention was specifically addressed by the district court. (Memo. Op., Ryan J.S., App. 21-22). The court's rejection of any constitutional basis for alleged fragmentation is irrefutable.

The people of the State of Illinois have spoken on this precise issue. Under Art. IV, sec. 6 of the former Constitution of 1870, the State had been divided into three separate and distinct areas for legislative redistricting *i.e.*, the so-called "tripartite" approach: the City of Chicago, the remainder of Cook County and then the remaining 101 counties within the State. Section 7 of the same Article provided that "outside . . . Cook County, such (representative) districts shall be bounded by County lines unless

the population of any county entitles it to more than one representative district."

The delegates who drafted the Constitution of 1970 specifically deleted those provisions so as to abolish the "tripartite division of the state" and expressly required plans for state redistricting to adhere to the one person-one vote principle, as well as being compact and contiguous. Art. IV, sec. 3a, Illinois Const. of 1970. See IV Debates of Sixth Illinois Const. Conv. 2935-2946. Consequently, the 1970 plan for legislative and representative reapportionment contained districts which overlapped the City of Chicago as well as the County of Cook and other counties within the state. This plan received the express endorsement of the Supreme Court of Illinois. *People ex rel. Scott* v. *Grivetti,* 50 Ill. 2d 146, 277 N.E.2d 881 (1972). Thus, considerations of the effectiveness of a rational state policy in redistricting, traditionally recognized by this Court as permissible [see *Mahan* v. *Howell,* 410 U.S. 315, 325 (1972)], were followed by the Otto proponents in their inclusion of districts which overlapped the borders of the City of Chicago.

It is apparent, therefore, that the Otto plan in this regard sought to apply the fundamental precepts of redistricting. The first step is a general examination of the demographic changes in the last decade and then there follows a formation of districts which follow the shift in population. (Hofeller, Tr. 17, 25). The shift in population revealed that both Whites and Blacks, and to a lesser degree Hispanics, moved from the City to the suburbs. Their political persuasion did not change. The Otto plan simply identifies this demographic phenomenon.

The minor significance of the whole issue of fragmentation was put to rest in the analysis of both plans

as to fragmentation. Otto Exhibits 71, 72 and 74 indicate the County and Township splits in the various plans. The Otto plan has a total of twenty-three split counties and within those counties twenty-two townships are split. There are 102 counties in the State of Illinois and approximately 1500 townships. The Ryan plan splits 12 counties, and within those twelve counties, 18 townships. (Brace, Tr. 1062).

The purported improper fragmentation of the Otto map disappears, therefore, when one considers the approach of the Otto proponents, namely to have the fragmentation criteria succeed both equal population and minority representation. One of the principal contentions at the trial centered on the insistence of the Ryan and Howlett-Ogilvie proponents to utilize the borders of the City of Chicago as a districting boundary. Dr. Hofeller insisted that the City of Chicago was "entitled" to just under six full Congressional seats. (Hofeller, Tr. 43).

In support of the view that there should be no blind adherence to the City border as a boundary, Otto presented the testimony of Edward Marciniak, a noted urbanologist. He testified that in most of the cities of the North, and particularly Chicago, abutting suburbs are becoming more and more like the central City, the municipality itself. They have the same or similar problems and characteristics, *i.e.*, social, economic and others. Mr. Marciniak gave a number of examples where the normal daily economic activities of the people ignore the municipal boundaries. The examples of the "real Chicago", as he termed it, include the Chicago Association of Commerce and Industry, the Chicago Federation of Labor, the Chicago Archdiocese, private school systems, religious communities, employment trends, the mass transit systems,

and even mail deliveries which take no cognizance of the municipal boundaries. (Marciniak, Tr. 413-420). In his judgment, the trend of the future is that the City and suburbs must unite or reunite rather than create divisions, and the Otto map advances this purpose. (Marciniak, Tr. 422).

The Ryan Appellants seek also to create an issue of constitutional significance in the purported "wasting" of white suburban votes due to the overlapping districts. (Ryan J.S., App. 23-24) As we have pointed out, there is absolutely no evidentiary basis to this allegation in view of the political fairness approach of the Otto proponents as well as the state policy of Illinois citizens expressed in the state constitution. But even if the issue were legitimately raised, there is no precedent from this or any other court which accepts this contention as an issue of constitutional proportions. Evidence of this appears from a review of the authority advanced by Ryan. Piecing comment from various current and former distinguished members of this Court in prior decisions, in the form of dicta or dissent, Ryan apparently makes a claim of constitutional proportion for suburban population vote dilution, because some Chicago suburbanites will now vote with Chicagoans. There is no such "discriminatory" intent in evidence here, whether by inference or direct testimony. There is no constitutional right underlying such a claim.

CONCLUSION

For the reasons given, Appellee Otto respectfully submits there can be no possible dispute on this Record that the Otto plan is far superior to the other two submitted to the district court. It has the lowest deviation from the ideal while adhering to the precept that re-

districting follow the movement of the population within the last decade. It preserves and ensures minority representation to both Blacks and Hispanics without unnecessarily denying access to the political process in *congressional* redistricting to tens of thousands of Blacks in the western and southern suburbs of the City of Chicago. It addresses the political fairness factor, to the extent that it is relevant, in a manner which delivers an element of fairness to all the voters of Illinois in a measure reflecting the traditional strengths of both major political parties. It adopts an approach adhering to political subdivisions in a manner consistent with a rational state policy expressed in the State's Constitution. It has contiguous and reasonably compact districts.

In short, the decision of the district court is so obviously correct and so obviously supported by the evidence and the law as to warrant no further argument or review in this Court. Accordingly, Appellee Otto respectfully moves that this Court affirm the judgment entered in this cause by the district court.

Respectfully submitted,

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Motion to Dismiss or Affirm

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No. 81-1068

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GEORGE H. RYAN, et al.,

Appellants,

v.

EARL NEIL OTTO, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

MEMORANDUM OF STANLEY T. KUSPER, JR., CLERK OF COOK COUNTY, ILLINOIS, IN LIEU OF MOTION TO DISMISS OR AFFIRM

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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MEMORANDUM OF STANLEY T. KUSPER, JR., CLERK OF COOK COUNTY, ILLINOIS, IN LIEU OF MOTION TO DISMISS OR AFFIRM

Appellee Stanley T. Kusper, Jr., Clerk of Cook County, has been held by the United States District Court for the Northern District of Illinois, Eastern Division, and by the United States Court of Appeals for the Seventh Circuit, to be a nominal defendant. Mr. Kusper's duties with respect to elections are confined to Cook County and are ministerial in nature. Mr. Kusper, therefore, takes no position with respect to the apportionment of Illinois Congressional Districts or the Jurisdictional Statements filed by Appellants.

Mr. Kusper, however, is interested in this case inasmuch as decisions made by the court below, and which may be made by this Court with respect to rescheduling the statutory election timetable, affect his ability to perform his statutory duties relating to the administration of the election laws in time to meet various deadlines imposed on him by Illinois law. Appellee Kusper, therefore, reserves the right to respond to any motion addressed to this Court to further change filing deadlines for Congressional candidates.

Respectfully submitted,

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Reply Brief

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In the

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Plaintiffs - Appellants,

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Defendants - Appellees.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

BRIEF OF APPELLANTS GEORGE H. RYAN, ET AL. IN OPPOSITION TO MOTION TO AFFIRM

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Backstrom, Robins and Eller, *Issues in Gerrymandering: An Exploratory Measure of Partisan Gerrymandering Applied to Minnesota*, 62 MINN. L. REV. 1121 (1978) 4

No. 81-1068

In the

Supreme Court of the United States

OCTOBER TERM, 1981

GEORGE H. RYAN, et al.,

Plaintiffs - Appellants,

vs.

EARL NEIL OTTO, et al.,

Defendants - Appellees.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

BRIEF OF APPELLANTS GEORGE H. RYAN, ET AL. IN OPPOSITION TO MOTION TO AFFIRM

Introduction

Appellants George H. Ryan, Monica Faith Stewart, Arthur L. Turner, the House of Representatives of the State of Illinois, Mark Q. Rhoads, Hyman Schneider, Phil Schneider and Patrick Rea, by their attorneys and pursuant to Supreme Court Rule 16.5, respectfully request the Court to deny appellee Earl Neil Otto's motion to affirm, and to enter an order noting probable jurisdiction.

Summary of Argument

The motion to affirm of appellee Earl Neil Otto carefully avoids the most substantial question presented by this appeal: whether lower federal courts in the next 10 years should be guided by the incorrect, even dangerous, approach to congressional

redistricting adopted by the district court majority in this case. Appellants respectfully submit that the redistricting plan imposed by the district court majority cannot withstand the high degree of scrutiny demanded by this Court in *Connor* v. *Finch,* 431 U.S. 407 (1977) for judicially created congressional district maps.

Notwithstanding appellee's assertion that appellants resorted to "imaginative rhetoric" to "manufacture" issues for this Court's consideration (Motion to Affirm 5), this case presents several crucial, constitutional questions about congressional redistricting which this Court has never addressed, much less resolved.

These questions are:

1) whether a court should adopt a congressional redistricting plan based upon its own necessarily speculative and subjective opinion as to whether the plan is "politically fair";

2) whether a court may properly use the "one person, one vote" standard as the dispositive criterion for choosing between alternative redistricting plans before it, even where the differences between those plans are numerically microscopic;

3) whether a court must pack all racial minorities into the fewest number of congressional districts possible; thereby erasing any minority influence in other districts;

4) whether a court may totally ignore legislative policy on redistricting based upon the margin of votes by which that policy was enunciated; and

5) whether a federal court may substitute its own sociological preferences for clearly defined state legislative policy creating political subdivisions and their boundaries.

Appellants respectfully submit that the district court majority incorrectly answered each of these questions in the affirmative. Unless this Court denies appellee's motion to affirm and notes probable jurisdiction in this case, federal courts throughout the country in all probability will take their cue from the unprecedented approach of the court below.

The summary affirmance sought by appellee in this case normally would settle issues only for the parties to this case, and not for anyone else. See *Fusari* v. *Steinberg*, 419 U.S. 379, 392 (1975) (Burger, C.J., concurring). However, because this is apparently the first congressional redistricting case to reach this Court after the 1980 census, the disposition of this appeal will be of the utmost importance to other lower federal courts which must also decide redistricting cases in the near future. Therefore, at the very least, a summary affirmance of the district court majority's decision in this case will cause considerable confusion about the validity of the grounds for that decision. This Court has stated that "[s]ummary actions . . . should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved." *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977). Thus, a summary affirmance in this case would inevitably lead other lower federal courts to conclude that the district court majority's rationale, including its unusual application of a "political fairness" doctrine, is consistent with prior decisions of this Court, and therefore must be followed.

The current process of redistricting throughout the country is far too important to rest on such vagaries. This case raises profound questions which require the Court's analysis in order to provide an appropriate guide to lower courts.

"POLITICAL FAIRNESS"

The district court majority's unprecedented reliance upon an ill-defined "political fairness" doctrine is the most potentially dangerous aspect of the decision below. Appellee states that the district court's reliance upon this doctrine was "tentative at best." Motion to Affirm 21. Certainly, there was ample reason for the timidity of the court below: its novel excursion deep into the political thicket has no support whatsoever in any prior decision of any court, including *Gaffney* v. *Cummings*, 412 U.S. 735 (1973).

This Court ruled in *Gaffney* that, under the particular circumstances of that case, it would not overrule the political decision of a political branch of government to achieve political fairness in a

state legislative redistricting plan. This is a far cry from the district court majority's own exercise in partisan engineering.

Appellee's own evidence reveals that the likely partisan division of the Illinois congressional delegation under the district court majority's plan differs by only one seat *at most* from the likely division under the Ryan appellants' plan. Otto Exhibit 24 speculates that the court-imposed plan would create nine Democratic, 12 Republican, and one "swing" district (i.e., a delegation of nine or 10 Democrats and 12 or 13 Republicans.) Otto Exhibit 78 guesses that the Ryan appellants' plan would create eight Democratic, 13 Republican and one "swing" district (i.e., a delegation of eight or nine Democrats and 13 or 14 Republicans). A possible difference of one seat is a slender reed indeed upon which to conclude that a redistricting plan "best advance[s] the goal of 'political fairness.' " Jurisdictional Statement, App. 20.

Plainly, it is improper for a federal court to inject itself into the political realm in this manner, particularly when the results are likely to be anything but fair. Academics who have made an "[e]xtended examination" of the political fairness question have determined that "using a proportional representation standard" such as adopted by the district court majority inevitably "will be unfair to one [political] party or the other, [so that] a choice must be made" as to which party is to be favored. Backstrom, Robins and Eller, *Issues in Gerrymandering: An Exploratory Measure of Partisan Gerrymandering Applied to Minnesota,* 62 MINN. L. REV. 1121, 1134 (1978).

Thus, any court in the future may take comfort in the "political fairness" doctrine of the court below to support profoundly unfair and undemocratic decisions which favor the political party of the *court's* choice. It is respectfully submitted that this Court should note probable jurisdiction in order to declare whether this sort of partisan engineering is an appropriate judicial function.

POPULATION EQUALITY

Appellee's motion to affirm tacitly concedes that all three of the plans which were before the district court satisfy the constitutional "one person, one vote" standard. Appellee merely asserts

that his plan "best satisfies" that standard. Motion to Affirm 4. Essentially, it is appellants' position that there are no degrees of constitutionality: either a plan is constitutional, or it is not. In this case, as Chief District Judge McGarr observed in his dissent, all three of the redistricting plans which were presented to the court below "meet the criteria of numerical equality within acceptable limits, and this factor alone therefore is not a compelling basis for choosing among the plans." Jurisdictional Statement, App. 24.

Without specifically citing language from a single decision, appellee blithely asserts that the court below "expressly considered" seven decisions of this Court on the issue of population equality. Motion to Affirm 16. Appellee does not even assert that these decisions support the manner in which the district court majority applied the "one person, one vote" standard in this case.

Given the continuing development of sophisticated computer technology, it is likely that every court which addresses the redistricting issue from this day forward will be presented with plans in which population deviations are measured in the scores of persons or, at most, the hundreds, rather than the huge variances which characterized redistricting cases from 1964 through 1973. Unless this Court clears the air by noting probable jurisdiction in this case, these future redistricting courts will also be confronted with conflicting prior decisions on how to choose between plans with such small population deviations.

As a result, one court will follow the decision of the district court majority in this case and will automatically choose the plan before it which "has the least deviation from the ideal district population." Jurisdictional Statement, App. 15. Another court will follow decisions such as *Donnelly* v. *Meskill*, 345 F. Supp 962, 965 (D. Conn. 1972) and, after determining that all plans before it achieve "virtually complete population equality," then choose a plan based upon non-constitutional, discretionary criteria. See also *Drum* v. *Scott*, 337 F. Supp. 588, 590 (M.D.N.C. 1972); *Skolnick* v. *State Electoral Board of Illinois*, 336 F. Supp. 839, 842 n. 2 (N.D. Ill. 1971). Direction from this Court is required to avoid such inconsistent results, it is respectfully submitted.

MINORITY REPRESENTATION

Appellants believe that the redistricting plan adopted by the district court majority is racially discriminatory because it wastes minority votes by unnecessarily packing suburban blacks and Hispanics into districts already dominated by Chicago minorities. Appellee admits that this subtle "track and tack" form of racial discrimination is one which neither this Court nor any other court has ever addressed. Motion to Affirm 21. Moreover, appellee does not dispute the importance of the question of whether *including* racial minorities in an already minority - dominated congressional district can constitute unconstitutional or illegal discrimination.

Instead, appellee asserts that it is "simply absurd" (Motion to Affirm 17) and "offensive" (Motion to Affirm 19) for appellants to contend that relatively small numbers of blacks and Hispanics who live in the Chicago suburbs can have an impact on the results of congressional elections in heavily white, all - suburban districts. Appellee distorts the record when he cites three witnesses as stating that there is "*no possible way* within the next decade that Blacks . . . could . . . even influence a congressional election in a predominantly suburban district." Motion to Affirm 19. In fact, none of these three witnesses even commented on the ability of blacks and Hispanics to *influence* congressional elections in districts in which they are in the minority. For example, Otto's two experts merely said that racial minorities would not obtain a population *majority* in any conceivable suburban district before 1990 (Brace, Tr. 391; Marciniak, Tr. 454 - 455).

It flies in the face of common sense (as well as the testimony of the black political activist referred to by appellee, Motion to Affirm 18), to assert that even a small number of blacks or Hispanics cannot *influence* the outcome of an election. History is filled with examples of elections in which the switch of a few thousand votes, or even a few hundred, would have changed the outcome. Moreover, a relatively small number of blacks or Hispanics could, by their very presence in a district, force all contenders to address issues of special concern to racial minorities, much as they did in the trial of this case.

Appellants respectfully submit that the Court should note probable jurisdiction so that it may give plenary review to the question of whether the district court majority's redistricting plan "is a 1981 version of the racial discrimination condemned by this in *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960)." Jurisdictional Statement 19.

WILL OF THE PEOPLE

The congressional redistricting plan offered by the Ryan appellants was the *only* plan before the district court which had received state legislative approval. Courts in redistricting cases have traditionally given deference to "the will of the people of [a state] . . . and their elected representatives," as expressed by the legislative approval of a plan. *Preisler* v. *Secretary of State of Missouri*, 341 F. Supp. 1158, 1161 (W.D. Mo.), *aff'd sub nom. Danforth* v. *United States*, 407 U.S. 901 (1972).

Appellee defends the district court majority for giving no weight whatsoever to the approval of the Ryan plan by the House of Representatives of the State of Illinois. Without citing any authority, appellee asserts that the House of Representatives did not express the will of the people; in particular, appellee noted that the House adopted the Ryan plan by the barest of majorities, and that the State Senate approved a different plan, which was not even presented to the distict court. Motion to Affirm 24. Of course, appellee does not, and could not, contend that his plan, which the district court majority adopted, represented the will of anyone other than the handful of persons who drew it behind closed doors.

It is respectfully submitted that, by noting probable jurisdiction in this case, the Court would afford itself the opportunity to determine the appropriate weight which a redistricting court should give to legislative approval of one of the alternative plans presented to it.

POLITICAL SUBDIVISION BOUNDARIES

Appellee concedes, as he must, that the redistricting plan imposed by the district court majority in this case completely

ignores the political boundary between the City of Chicago and the surrounding suburbs, as well as the boundaries of 23 out of the 102 counties in the state. Motion to Affirm 26 - 27. The only support for this wholesale fragmentation of political subdivision boundaries comes in the vague declaration of appellee's expert that "rigid" adherence to boundaries such as the Chicago city line is "not appropriate or desirable." Motion to Affirm 13. Another witness proclaimed that it *was* desirable to recognize the supposed similarities between the city and the suburbs by ignoring the city line in the context of redistricting. Motion to Affirm 27 - 28.

However, as Chief District Judge McGarr properly stated in his dissent, "[i]t is not the business of this court to work toward the 'crumbling' of political boundaries *created by a legislature* at other times and for other reasons. This hearing is not an exercise in sociological preferences." Jurisdictional Statement, App. 25 - 26 (emphasis added).

Significantly, the Supreme Court of Illinois recently addressed this issue in the context of state legislative redistricting and declared that it was both desirable and constitutionally permissible "to accommodate the interests of political subdivisions," while at the same time adhering to the "one person, one vote" standard. *Schrage* v. *State Board of Elections,* No. 55661 (Supreme Court of Illinois), November 25, 1981) (Slip op. 15).

Appellants respectfully submit that the Court should grant plenary review of this case in order to analyze the appropriate weight to be given by a redistricting court to non-constitutional discretionary factors, including respect for the integrity of political subdivision boundaries, where all plans before the court satisfy the "one person, one vote" standard.

CONCLUSION

For each of the foregoing reasons, appellants respectfully request the Court to deny appellee's motion to affirm and to enter an order noting probable jurisdiction.

Respectfully submitted,

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